2888

# INTERSTATE COMMERCE COMMISSION.

No. 6484.

CITY OF NASHVILLE ET AL.

*v.*

LOUISVILLE & NASHVILLE RAILROAD COMPANY ET AL.

75628—15 WASHINGTON : GOVERNMENT PRINTING OFFICE : 1915

No. 6484.

# CITY OF NASHVILLE ET AL.

*v.*

# LOUISVILLE & NASHVILLE RAILROAD COMPANY ET AL.

*Submitted October 22, 1914. Decided February 1, 1915.*

The Louisville & Nashville and Nashville, Chattanooga & St. Louis own separate terminals at Nashville, but maintain and operate them jointly under the title of "the Nashville terminals," apportioning the expenses of maintenance and operation monthly on the basis of the total number of cars of all kinds handled for each road. Through the "Nashville terminals" both roads serve the industries on each other's tracks at Nashville in addition to the industries on their own. No charge is imposed upon shippers for the service performed. The Tennessee Central, the only other road into Nashville, maintains separate terminals. The Louisville & Nashville and Nashville, Chattanooga & St. Louis interchange noncompetitive traffic with the Tennessee Central at a charge of $3 per car, but competitive traffic is interchanged only at the local rates to and from the points of interchange, which rates range from $5 to $36 per car, except that the Tennessee Central switches competitive and noncompetitive grain between the Hermitage elevator and points of interchange with the Louisville & Nashville and Nashville, Chattanooga & St. Louis for $2 per car. At other points the Louisville & Nashville and Nashville, Chattanooga & St. Louis interchange competitive and noncompetitive traffic with other carriers at the same rates; *Held*, That—

1. The Louisville & Nashville and Nashville, Chattanooga & St. Louis interchange competitive and noncompetitive traffic with each other at Nashville at cost, exclusive of fixed charges; the charge of $3 per car for switching noncompetitive traffic to and from the Tennessee Central is not shown to be unreasonable; the Tennessee Central should not be required to pay greater charges than the Louisville & Nashville and Nashville, Chattanooga & St. Louis pay each other; the charge of $2 per car imposed by the Tennessee Central for switching grain to and from the Hermitage elevator unduly prefers that elevator.
2. Section 1 of the act requires railroads subject to the act to furnish transportation, including the transportation of cars of connecting carriers, and since adequate provision is made for the return of cars interchanged and for compensation for their use, and the use of tracks incidental to transportation conducted entirely by the carrier whose tracks are used is the very use which railroads are constituted to afford, no property is taken by these provisions.
3. A carrier interchanging traffic with one connecting carrier and thereby short hauling its own line can not refuse to interchange traffic with another connecting carrier solely on the ground that its own line will be short hauled thereby.

*T. M. Henderson* for Traffic Bureau of Nashville.

*M. S. Ross*, *Perkins Baxter*, and *O. P. Anderson* for Business Men's Association of Nashville.

*A. G. Ewing, jr.*, and *F. M. Garard* for city of Nashville.

*Edward S. Jouett* for Louisville & Nashville Railroad Company.

*R. Walton Moore*, *J. D. B. DeBow*, *Frank W. Gwathmey*, and *Claud Waller* for Nashville, Chattanooga & St. Louis Railway.

*Walter Stokes* for Tennessee Central Railroad Company.

REPORT OF THE COMMISSION.

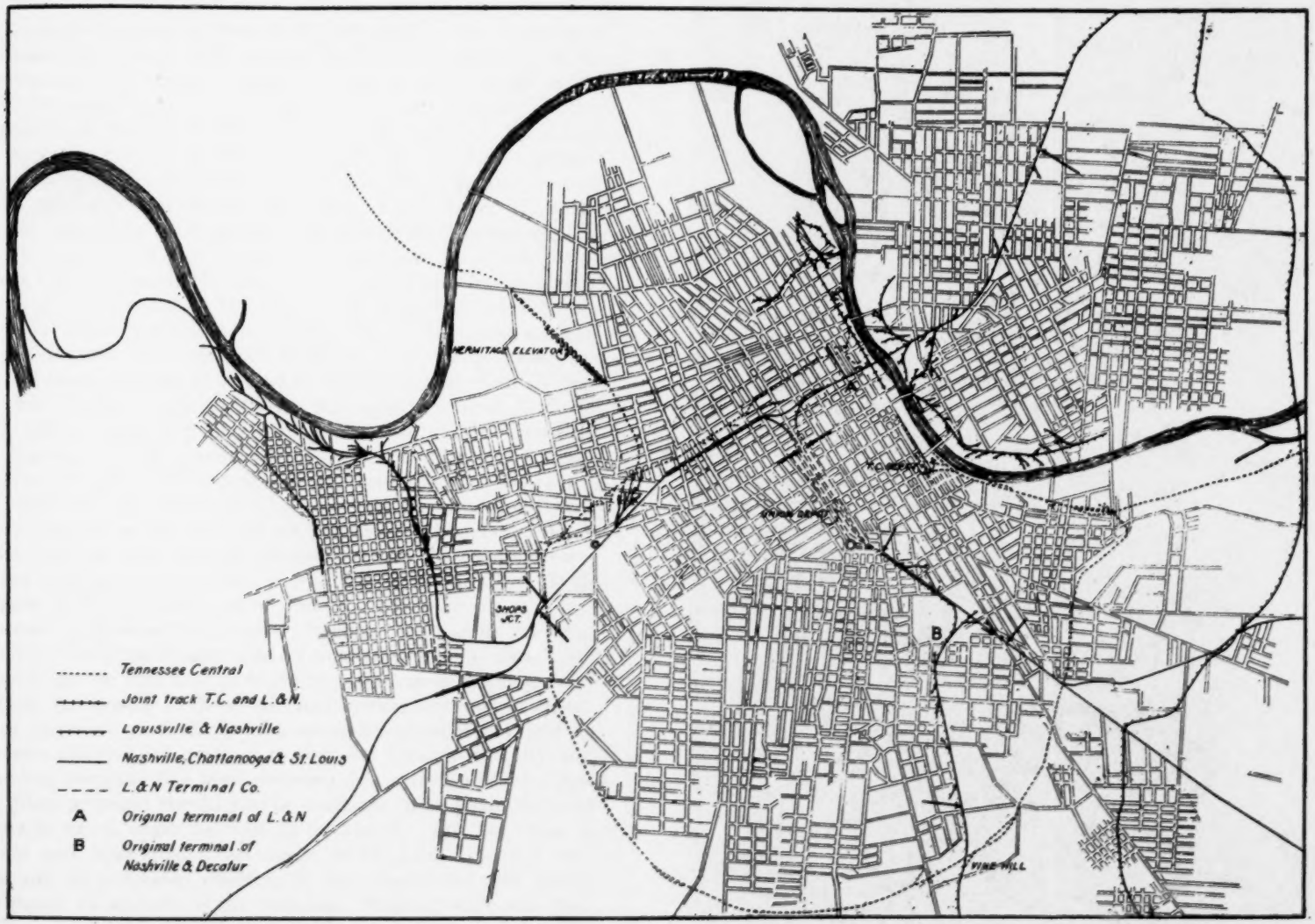
MEYER, *Commissioner:*

This case concerns the switching practices and charges at Nashville, Tenn. The complainants are the city of Nashville and the Traffic Bureau of Nashville. The Traffic Bureau of Nashville is a Tennessee corporation organized to promote and protect the commercial interests of Nashville and represents practically all of the large receivers and shippers of freight in Nashville. It is not organized for profit. The Business Men's Association of Nashville, a voluntary association of similar character, has intervened and joins in the complaint.

Nashville is served by three railroads: The Louisville & Nashville; the Nashville, Chattanooga & St. Louis; and the Tennessee Central. The Louisville & Nashville reaches Nashville from the north, from Cincinnati, Louisville, and St. Louis, and extends from Nashville south to Birmingham, Ala., and other southern points. The Nashville, Chattanooga & St. Louis enters the city from the west, from Hollow Rock, Tenn., where its lines from its three western termini at Hickman and Paducah, Ky., and Memphis, Tenn., converge, and extends through the city southeast to Chattanooga, Tenn., and other points. The Tennessee Central enters from the northwest, from Hopkinsville, Ky., where it connects with the Illinois Central, and extends through the city east to Harriman, Tenn., where it connects with the Southern Railway. The Louisville & Nashville and Nashville, Chattanooga & St. Louis are natural competitors for Nashville traffic, and both lines compete for Nashville traffic with the Tennessee Central. All three have extensive terminal facilities within the city, including freight depots, yards, and main, side, team, and spur tracks. The Louisville & Nashville tracks reach industries located principally in the northern, eastern, and southern sections of the city; those of the Nashville, Chattanooga & St. Louis, industries in the southern, central, and western sections; while the Tennessee Central tracks reach industries located principally in the northern, southern, and southeastern sections. The tracks of the Tennessee Central are connected with the tracks

of the Nashville, Chattanooga & St. Louis by an interchange track at Shops Junction, in the western section of the city, and with the tracks of the Louisville & Nashville by an interchange track at Vine Hill, just outside of the city on the south. The tracks of the Louisville & Nashville and Nashville, Chattanooga & St. Louis are connected at several points, but principally in the yards of the Louisville & Nashville Terminal Company, in the center of the city. The situation is illustrated by the accompanying map.

The Louisville & Nashville Terminal Company, hereinafter called the "terminal company," is best described by a brief account of its origin and development. Prior to 1872 the Louisville & Nashville line into Nashville from the north terminated at a point in the northern section of the city on the west bank of the Cumberland River. The Louisville & Nashville line from the south, the Nashville & Decatur Railroad, terminated at a point several miles south of the terminus of the northern line. Separate terminals were maintained at the two points, and the Louisville & Nashville had no tracks of its own within the city connecting them. The only other lines into Nashville at that time were the Nashville & Chattanooga from the southeast and the Nashville & Northwestern, owned by the Nashville & Chattanooga, from the west, which terminated about midway between the termini of the two Louisville & Nashville lines. The Louisville & Nashville's northern line connected with the Nashville & Northwestern at a point approximately 1 mile north of the terminus of the latter, and the Nashville & Decatur connected with the Nashville & Chattanooga near the terminus of the Nashville & Decatur. On May 1, 1872, the Nashville & Chattanooga, for an agreed annual rental, accorded to the Louisville & Nashville a perpetual right to run its trains and locomotives over a track to be constructed for the Nashville & Chattanooga by the Louisville & Nashville from the trestle then connecting the Louisville & Nashville's northern line with the Nashville & Northwestern to the depot grounds of the Nashville & Chattanooga; thence over the tracks of the Nashville & Chattanooga through said depot grounds; thence over a track to be constructed by the Louisville & Nashville as its own property from the southern approach to the Nashville & Chattanooga depot grounds to the depot of the Nashville & Decatur, alongside of the existing track of the Nashville & Chattanooga, the necessary right of way to be furnished by the Nashville & Chattanooga. It was also agreed that the Louisville & Nashville would contribute $50,000 toward the construction of a union passenger station on the depot grounds of the Nashville & Chattanooga whenever the Nashville & Chattanooga should contribute an equal amount for the same purpose. The tracks provided for in the agreement were constructed


HERMITAGE ELEVATOR
SHORT VCT.
B
FIRE HILL
Tennessee Central
Joint track T.C. and L.&N.
Louisville & Nashville
Nashville, Chattanooga & St. Louis
L.&N Terminal Co.
A Original terminal of L.&N
B Original terminal of Nashville & Decatur

immediately, but not the union passenger station. In 1873 the name of the Nashville & Chattanooga was changed to Nashville, Chattanooga & St. Louis. In 1893 and to facilitate the construction of a union passenger station as tentatively proposed in the agreement of 1872, the Louisville & Nashville and Nashville, Chattanooga & St. Louis organized the terminal company. The general incorporation laws of Tennessee were amended March 17, 1893, to authorize the organization of railway terminal corporations, Laws of Tennessee, 1892, ch. 11, p. 15; and on March 23, 1893, the terminal company was incorporated under them. Following its organization the terminal company existed in name only until April 27, 1896, when the Louisville & Nashville and Nashville, Chattanooga & St. Louis leased to it for a period of 999 years all of its property and railroad appurtenances thereon which the lessors severally owned or controlled within, or in the immediate vicinity of, the original depot grounds of the Nashville & Chattanooga. The terminal company covenanted to construct upon the premises demised and other premises to be used in connection therewith all passenger and freight buildings, tracks, and other terminal facilities suitable and necessary for all railroads centering at Nashville that might contract with the terminal company therefor. Shortly thereafter, June 15, 1896, the terminal company leased back to the Louisville & Nashville and Nashville, Chattanooga & St. Louis jointly all property acquired by the terminal company under the lease of April 27, 1896, together with all other property which the terminal company has subsequently acquired or which it might acquire. Both the charter of the terminal company and the act under which it was incorporated authorized the terminal company to lease its property and terminal facilities to any railroad company utilizing them upon such terms and for such time as might be agreed upon by the parties. Meanwhile the people of Nashville had become desirous of better terminal facilities, particularly of a union passenger depot, and an ordinance authorizing a contract to that end between the city and the terminal company had been proposed, but with the proviso that the facilities proposed should also be available on an equitable basis to railroads which might be built in the future. The Louisville & Nashville and Nashville, Chattanooga & St. Louis opposed this proviso and an ordinance omitting it was passed, but was vetoed by the mayor on account of the omission. Nothing more was done until June 21, 1898, when the terminal company entered into an agreement with the city of Nashville whereby the terminal company agreed to construct a union passenger station on the premises covered by the leases of April 27 and June 15, 1896, at least two freight stations, platforms, tracks, switches, etc., certain viaducts over its

tracks, and certain new streets and extensions of existing streets. The city agreed to secure the condemnation of land, to close certain existing streets, and to erect approaches to certain of the viaducts to be constructed by the terminal company. No provision was made for future railroads. The improvements agreed upon were duly made at a cost of approximately $100,000 to the city and of several million dollars par value of bonds to the terminal company, which bonds were guaranteed by the Louisville & Nashville and Nashville, Chattanooga & St. Louis as authorized by the terminal company's charter, and were used to repay funds advanced by the guarantors to the terminal company and expended by the latter for the construction of the facilities which it had undertaken to construct. Pursuant to this agreement the terminal company constructed a union passenger station, two adjoining freight depots, a roundhouse, some coal chutes, and adjoining yard tracks. The tracks constructed are connected with the tracks of the Louisville & Nashville and of the Nashville, Chattanooga & St. Louis, but not with the tracks of the Tennessee Central. On December 3, 1902, the lease of June 15, 1896, from the terminal company to the Louisville & Nashville and Nashville, Chattanooga & St. Louis jointly was modified and in part rescinded. The duration of the lease was reduced from 999 to 99 years, its monetary considerations were modified, and the lessees were reinvested in severalty with their original titles to all the property leased by them to the terminal company April 27, 1896, except for the intervening lien of the first mortgage for $3,000,000 which had been given to secure the terminal company's bonds.

The Louisville & Nashville owns all of the capital stock of the terminal company and 71.776 per cent of the outstanding capital stock of the Nashville, Chattanooga & St. Louis, which it began to acquire in 1880.

Prior to August 15, 1900, the Louisville & Nashville and Nashville, Chattanooga & St. Louis operated their respective terminals independently. Each road switched for the other at a charge of $2 per car, but on competitive traffic the switching charge was absorbed. Since August 15, 1900, all of their terminal facilities, including the terminal buildings, tracks, and other facilities leased by them jointly from the terminal company, except their individual team tracks and separate freight depots, have been maintained and operated jointly. The arrangement is called the "Nashville terminals" and is managed by a board of three, composed of the general managers of the two roads and a superintendent of terminals. The total expense of maintenance and operation is apportioned monthly between the two roads on the basis of the total number of cars and locomotives of all kinds handled for each. The association is not

incorporated and is not a terminal company in the sense that the principal purpose of its existence is "to furnish terminal facilities for carriers which lack them." It is a joint agency voluntarily constituted by the Louisville & Nashville and Nashville, Chattanooga & St. Louis for the joint maintenance and operation of their own facilities for their own use. The terminal tariffs of both roads publish service by the Nashville terminals and provide that "there is no switching charge to or from locations on tracks of the Nashville terminals, within the switching limits, on freight traffic, carloads, from or destined to Nashville" over either road, "regardless of whether such traffic is from or destined to competitive or noncompetitive points."

The Tennessee Central entered Nashville 1901–2 after strong opposition from the Louisville & Nashville, and leases its terminal facilities, consisting of a passenger station, freight depots, shops, main, side, and spur tracks, from the Nashville Terminal Company, a Tennessee railroad terminal corporation organized August 12, 1893, and empowered to lease its property to any railroad.

Prior to 1907 neither the Louisville & Nashville nor the Nashville, Chattanooga & St. Louis would interchange traffic with the Tennessee Central at Nashville or at any other point of connection. During 1907 both roads began to interchange with the Tennessee Central all noncompetitive traffic, except coal traffic, at a charge of $3 per car. Noncompetitive traffic is defined as traffic between Nashville and points served by only one railroad into Nashville or points served by two or more railroads into Nashville for which, however, one road can maintain rates which the others can not meet. The interchange is effected at Shops Junction.

On December 9, 1913, upon complaint by the city of Nashville, the Traffic Bureau of Nashville, and others, this Commission found that the Louisville & Nashville and Nashville, Chattanooga & St. Louis switched all traffic for each other at Nashville, but refused to switch coal from the Tennessee Central, except at the prohibitive rate of 60 cents per ton. No differentiating conditions were found, and it was decided that the Louisville & Nashville and Nashville, Chattanooga & St. Louis unjustly discriminated against coal from the Tennessee Central in favor of coal from each other's lines. The refusal of the Tennessee Central to switch coal from the Louisville & Nashville and Nashville, Chattanooga & St. Louis was found to be a purely retaliatory measure. *Traffic Bureau of Nashville, Tenn.* v. *L. & N. R. R. Co.*, 28 I. C. C., 533, affirmed in *L. & N. R. R. Co.* v. *United States*, 216 Fed., 672. An order was entered requiring the Louisville & Nashville and Nashville, Chattanooga & St. Louis to "abstain from maintaining any different practice with respect to

switching interstate carload shipments of coal from and to the tracks of the Tennessee Central Railroad Company at Nashville, Tenn., than they contemporaneously maintain with respect to similar shipments of coal from and to their respective tracks." The carriers have construed this order to relate exclusively to noncompetitive coal and have responded by switching noncompetitive coal from the Tennessee Central at a charge of $3 per car, the same as all other noncompetitive traffic, but without changing their former practice relative to competitive coal.

The Louisville & Nashville will switch competitive coal and other competitive traffic to and from the Tennessee Central, but only at the local rates between Nashville and Overton, Tenn., which are the rates between Nashville and Vine Hill, by intermediate application. The interchange is usually effected, however, at Shops Junction and over the rails of the Nashville, Chattanooga & St. Louis. Until January 25, 1914, the Nashville, Chattanooga & St. Louis would perform the same service at the local rates between Nashville and Shops Junction. From December 14, 1913, to January 25, 1914, just after the complaint in this case was filed, however, these rates were published in the Nashville, Chattanooga & St. Louis terminal tariff with an express provision that they would apply on competitive traffic from or destined to the Tennessee Central. Since January 25, 1914, the terminal tariffs of the Nashville, Chattanooga & St. Louis have provided that competitive traffic will not be switched to and from the Tennessee Central, and no rates between Nashville and Shops Junction have been published except that the local rates between Nashville and Harding, the first station west of Shops Junction, apply intermediately. The terminal tariff of the Tennessee Central provides that Louisville & Nashville and Nashville, Chattanooga & St. Louis competitive traffic will be switched to and from Shops Junction at the Tennessee Central's local rates between Nashville and Shops Junction.

The rates applied to this switching by the Louisville & Nashville total from $12 to $36 per car; the Nashville, Chattanooga & St. Louis rates, from $7 to $36 per car; the rates of the Tennessee Central, from $5 to $36 per car. These rates are virtually prohibitive. The Tennessee Central favors their reduction, but will not reduce its rates until the Louisville & Nashville and Nashville, Chattanooga & St. Louis shall agree to reduce theirs, which they refuse to do.

Complainants ask that the Louisville & Nashville and Nashville, Chattanooga & St. Louis may be required to interchange with the Tennessee Central all traffic to and from the industries on their respective lines at Nashville at a uniform charge not to exceed $2

per car, and that the Tennessee Central may be required to reciprocate.

The Tennessee Central insists that $3 per car is not an unreasonable switching charge for noncompetitive traffic, but makes no attempt to justify its charges on competitive traffic, and no brief has been filed on its behalf. The Louisville & Nashville and Nashville, Chattanooga & St. Louis, however, hereinafter called defendants, contest the petition in its entirety. The two kinds of traffic will be considered in order.

The only evidence that the present charge of $3 per car on noncompetitive traffic is intrinsically unreasonable, as complainants allege, is that lower charges, usually $2 per car, are imposed at many other points. This is not enough, for it is well understood that switching conditions are seldom the same at different points. There is some evidence that the conditions at Nashville are not altogether unlike the conditions at some points where lower charges are imposed, but not enough to justify a finding that the conditions are substantially the same. Defendants, moreover, insist that the actual cost to the Nashville terminals of handling city freight traffic at Nashville is not less than $4.13 per car, exclusive of fixed charges, as shown in the following table introduced as an exhibit:

| | Charged to passenger traffic. | Charged to through and city traffic. | Charged to city traffic only. | Charged to through traffic only. |
|---|---|---|---|---|
| Maintenance of way and structures | $16,459.16 | $85,280.26 | $132.99 | |
| Maintenance of equipment | 7,020.12 | 31,615.10 | 14,618.39 | $17,342.01 |
| Transportation expenses | 58,949.19 | 325,364.76 | 14,266.53 | 12,240.18 |
| General expenses | 4,191.38 | 26,387.00 | | |
| Total | 86,619.85 | 468,647.72 | | |
| Distribution of through and city traffic: | | | | |
| Charged to handling city traffic, 78.34 per cent | | | 367,138.63 | |
| Charged to handling through traffic, 21.66 per cent | | | | 101,809.09 |
| Total | | | 396,156.54 | 131,091.28 |
| Number of cars handled | | | 95,958 | 103,322 |
| Average cost per car | | | $4.128 | $1.269 |

Defendants assert that in making this estimate items definitely attributable to a particular kind of traffic were charged to that traffic, and that all other items were prorated on the basis of the relative number of hours of service of the yard crews assigned to each kind of traffic. Complainants attack the bases of apportionment used and object to the "general expense" block on the ground that it is a mere estimate based on the relation of general to total operating expenses shown in the accounts of 16 unnamed terminal companies. The objections made, however, and the analyses on which they are based are unconvincing and fail to show that defendants' figures are not

substantially correct, even though they may not be absolutely correct. We are of the opinion, therefore, that a charge of $3 per car for switching Tennessee Central noncompetitive traffic is not shown to be unreasonably high.

Complainants contend that at Birmingham, Ala., Atlanta, Ga., New Orleans, La., and Memphis, Tenn., the charges imposed are less than the cost of the service performed and that charges equal to the cost of the service at Nashville accordingly discriminate against Nashville, but we find no evidence to substantiate this contention.

The cost to the Nashville terminals of switching competitive Tennessee Central traffic is the same as the cost of switching noncompetitive traffic. Defendants urge against a uniform charge, however, that the two kinds of traffic are essentially different in that the interchange of competitive traffic may result in the loss of line hauls, whereas the interchange of noncompetitive traffic can not result in loss but may result in gain by enabling the industries accommodated to increase the volume of their business. The interchange of competitive traffic involves short hauling and for that reason, defendants insist, can not be compelled. Complainants reply that defendants interchange both kinds of traffic on the same terms with each other at Nashville, and at other points, notably Memphis, with other carriers also, so that their refusal to do so for the Tennessee Central at Nashville unlawfully discriminates against the Tennessee Central competitive traffic and against Nashville, in contravention of section 3 of the act. Defendants rejoin that conditions are different at such other points, and, contending that they have merely exchanged trackage rights to and from industries on their respective lines at Nashville, insist that each road, through the Nashville terminals as its agent, does all of its own switching at Nashville, and that neither road does any switching for the other.

We think complainants' contentions well founded. Defendants unquestionably interchange traffic with each other and without distinction between competitive and noncompetitive traffic. The cars of both roads are moved over the individually owned terminal tracks of the other to and from industries on the other, and both lines are rendered equally available to industries located exclusively on one. The movement, it is true, is not performed immediately by the road over whose terminal tracks it is performed, but neither is it performed immediately by the road whose cars are moved. It is performed by a joint agent for both roads, and that being so, we are of the opinion that the arrangement is essentially the same as a reciprocal switching arrangement and accordingly constitutes a facility for the interchange of traffic between, and for receiving, forwarding, and delivering property to and from defendants' respective lines,

within the meaning of the second paragraph of section 3 of the act. The joint maintenance and operation of the tracks utilized in a sense constitutes the terminal tracks of each road the tracks of the other, but inasmuch as both roads contribute nearly the same track mileage and defray the joint expenses in proportion to the number of cars handled for each the arrangement can not differ materially in ultimate consequences from an arrangement whereby each road performs all switching over its own tracks and interswitches traffic with the other. The Louisville & Nashville contributes 8.10 miles of main and 23.80 miles of side tracks; the Nashville, Chattanooga & St. Louis, 12.15 miles of main and 26.37 miles of side tracks. We can not agree with defendants' contention that they have merely exchanged trackage rights. But even if they have, we think the term "facility," as used in section 3 of the act, also includes reciprocal trackage rights over terminal tracks, the consequences and advantages to shippers being identical with those accruing from reciprocal switching arrangements.

The conclusion reached accords with the conclusion expressed in *Traffic Bureau of Nashville, Tenn.*, v. *L. & N. R. R. Co.*, *supra*, which case defendants have interpreted too narrowly. Although that case related exclusively to coal traffic, the decision and order related to competitive as well as noncompetitive coal. The history of defendants' terminal arrangements at Nashville is given in greater detail in this than in the former record, but discloses nothing to change our former conclusion.

Since defendants interchange traffic with each other they can not refuse to interchange traffic upon substantially the same terms with the Tennessee Central, provided the circumstances and conditions are substantially the same, and defendants are not required "to give the use of their tracks or terminal facilities" to the Tennessee Central within the meaning of the concluding proviso of section 3. *St. L., S. & P. R. R. Co.* v. *P. & P. U. Ry. Co.*, 26 I. C. C. 226; *Waverly Oil Works Co.* v. *P. R. R. Co.*, 28 I. C. C., 621; *Traffic Bureau of Nashville, Tenn.*, v. *L. & N. R. R. Co.*, 28 I. C. C., 533, affirmed in *L. & N. R. R. Co.* v. *United States*, 216 Fed., 672; *B., R. & P. Ry. Co.* v. *Pa. Co.*, 29 I. C. C., 114, affirmed in *Pa. Co.* v. *United States*, 214 Fed., 445; *Switching at Galesburg, Ill.*, 31 I. C. C., 294. Defendants insist upon the further limitation that they can not be compelled to "short haul" their own lines in favor of the Tennessee Central, but we can not agree with this contention. Section 1 of the act requires carriers by railroad to establish through routes and to interchange cars with connecting carriers. Through routes and the interchange of cars are thus expressly included among the facilities for the interchange of traffic which the second paragraph

of section 3 in turn requires carriers to afford to all connecting carriers equally and without discrimination in rates and charges. Section 15 empowers the Commission to establish through routes over connecting lines whenever the carriers themselves refuse or neglect to establish them voluntarily. It is true section 15 also provides that in establishing such through routes the Commission shall not "require any company, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith which lies between the termini of such proposed through route unless to do so would make such through route unreasonably long as compared with another practicable through route which could otherwise be established." This provision, however, relates exclusively to the power of the Commission to establish through routes, and, since orders against discrimination by carriers between their connections in the matter of through routes are enforceable without the establishment of through routes by the Commission, does not apply to the provisions of section 3 either expressly or by necessary implication. Defendants short haul their respective lines in favor of each other, and in our opinion can not under the act as now amended refuse to interchange traffic with the Tennessee Central solely on the ground that they would thereby short haul their own lines. Defendants also insist that the ownership of 71 per cent of the capital stock of the Nashville, Chattanooga & St. Louis by the Louisville & Nashville constitutes them a single line and entitles them to accord each other more favorable treatment than they accord to other lines. This contention was repudiated in *Traffic Bureau of Nashville, Tenn.*, v. *L. & N. R. R. Co.*, *supra.*

We do not find that the conditions of interchange of traffic between defendants' lines and the Tennessee Central differ substantially from the conditions of interchange between defendants' lines. Defendants assert that Tennessee Central cars delivered over their rails by the Nashville terminals normally return empty, whereas their own cars normally return loaded, except coal cars, and that coal cars occasionally return loaded with brick, stone, lumber, etc. No figures are given, however, nor is it clear that the difference in the return movement, if any, is not directly attributable to the interchange by defendants of competitive as well as noncompetitive traffic or possibly to the indiscriminate use of each other's cars. Tennessee Central cars can be placed at industries on defendants' rails west of Shops Junction in the same number of switching movements as defendants' cars. Tennessee Central cars necessitate an extra stop of defendants' switching

trains at Shops Junction, but are handled at that point more easily than defendants' cars are handled in the yards of the terminal company, defendants' primary classification yard. They are also hauled a shorter distance than defendants' cars. One more switching movement is required to place Tennessee Central cars at industries on defendants' rails east of Shops Junction than defendants' cars require—a movement from Shops Junction to the terminal company's yards. But since defendants' switching trains plying between the terminal company's yards and West Nashville all pass Shops Junction, the extra movement of Tennessee Central cars between Shops Junction and the yards of the terminal company can not cause much extra expense, and since noncompetitive Tennessee Central traffic is switched, such extra expense, if any, is evidently considered negligible by defendants themselves. The cost to defendants of switching competitive Tennessee Central traffic is the same as the cost of switching noncompetitive traffic. None of these conditions relative to switching Tennessee Central traffic, moreover, appears to differ materially from the conditions of interchange between defendants' lines prior to the creation of the Nashville terminals, which conditions were improved only at the very considerable expense incurred by defendants through the building operations of the terminal company.

Defendants contend that the interchange of competitive traffic with the Tennessee Central would not be mutually advantageous. In support of this contention they show that there are approximately 240 industries located exclusively on their rails, equipped with sidings that will accommodate approximately 2,350 cars, as compared with 100 industries equipped with sidings accommodating not over 700 cars located exclusively on the rails of the Tennessee Central, and that during the six months ending January 31, 1914, defendants delivered to the Tennessee Central for placement at Tennessee Central industries 245 loaded cars and 196 cars for transportation as compared with 952 cars received by defendants from the Tennessee Central for placement by the Nashville terminals and 104 cars received for transportation. These figures furnish some evidence that defendants together potentially control more traffic to and from Nashville than the Tennessee Central potentially controls and that defendants together may lose more competitive traffic through reciprocal switching than they will gain, although the figures given relative to the number of cars actually interchanged apparently relate exclusively to noncompetitive traffic. These comparisons, however, are irrelevant. Only the effect of reciprocal switching on defendants' lines individually is relevant, and as to this the record is silent. Neither is there any evidence that the

interchange of traffic between defendants' lines is mutually advantageous. If not mutually advantageous one line at least can not urge lack of mutual advantage against reciprocal switching with the Tennessee Central. If the Nashville, Chattanooga & St. Louis, for example, is willing to interchange traffic with the Louisville & Nashville, even though it loses more traffic than it gains, it is not in a position to refuse to interchange traffic with the Tennessee Central solely on the ground that more traffic will be lost than gained. Defendants assert that the industries served by them through the Nashville terminals are about equally divided between their respective lines. This does not prove, however, that the volume of traffic to and from the two groups of industries is the same or that the interchange of traffic between the two lines is mutually advantageous. General assertions are insufficient, moreover, to prove that reciprocal switching arrangements are mutually advantageous. More definite evidence should be given, preferably figures showing the precise amount of traffic surrendered or gained by each road participating in the arrangement. *Switching at Galesburg, Ill., supra.*

The Louisville & Nashville interswitches competitive and noncompetitive traffic on the same terms with other carriers at several other points, notably Memphis, Tenn., and Birmingham, Ala., while the Nashville, Chattanooga & St. Louis admittedly interswitches both kinds of traffic at the same rates with all connections at all points of connection with other carriers, except Nashville and Lebanon, Tenn., where it connects with the Tennessee Central. Since November 14, 1914, a switching charge of $2 per car for both kinds of traffic has been in effect at Lebanon. We do not find any substantial evidence that the conditions peculiar to the interchange of competitive traffic at such other points are substantially unlike the conditions at Nashville or that the interchange is mutually advantageous at such other points. Under these circumstances we think the almost unique policy pursued at Nashville requires more to justify it than has been shown.

The only use of defendants' "tracks or terminal facilities" asked by complainants for the Tennessee Central is the use incidental to the movement of Tennessee Central cars by defendants to and from industries on defendants' tracks. No use by Tennessee Central trains is asked, nor any use of defendants' freight depots or team or storage tracks. In the latter case defendants' tracks would be used for transportation conducted by the Tennessee Central. In the case of the use actually asked defendants will conduct the transportation, and the difference is more than a mere difference in degree.

Most of the industries involved are situated from 2 to 7 miles from Shops Junction. The service asked is a railroad haul, and in our

opinion constitutes transportation, as defendants tacitly concede when they argue that the local rates to and from Shops Junction and Vine Hill at which they had moved Tennessee Central competitive traffic are transportation rates for transportation to and from local points. Section 1 of the act requires railroads subject to the act to furnish transportation, including the transportation of cars of connecting carriers. Since adequate provision is made for the return of cars interchanged and for compensation for their use, and the use of tracks incidental to transportation conducted entirely by the carrier whose tracks are used is the very use which railroads are constituted to afford, no property is "taken" by these provisions. *G. T. Ry. Co.* v. *Michigan Ry. Comm.*, 231 U. S., 457; *C., M. & St. P. Ry. Co.* v. *Iowa*, 233 U. S., 334; *C., I. & L. Ry. Co.* v. *Railroad Commission*, 95 N. E., 364; *Pa. Co.* v. *U. S.*, 214 Fed., 445; *St. L., S. & P. R. R. Co.* v. *P. & P. U. Ry. Co.*, *supra*.

Complainants contend, moreover, that the local rates applied by defendants for the movement of Tennessee Central competitive traffic to and from Shops Junction have been applied as switching charges and that defendants have voluntarily subjected their tracks and terminal facilities to the use now asked for the Tennessee Central. The contention is not without merit. Defendants' terminals are admittedly open to noncompetitive Tennessee Central traffic; and the publication by the Nashville, Chattanooga & St. Louis of the rates to and from Shops Junction to apply on competitive Tennessee Central traffic in its terminal tariff from December 14, 1913, to January 25, 1914, constituted a distinct representation to the public that Tennessee Central competitive traffic would be switched at those rates by the Nashville, Chattanooga & St. Louis. Defendants explain this action on the ground that the expansion of the city had rendered Shops Junction an intracity or intraterminal point. Shippers, however, were under no duty to go behind the face of the tariff. Furthermore, no traffic other than Tennessee Central traffic is handled by defendants at Shops Junction, no pay station is maintained there, and defendants' tracks are not accessible at that point either by roadway or street. The Louisville & Nashville local rates similarly applied, which, as previously stated, are the rates between Nashville and Overton, Tenn., with intermediate application at Vine Hill, have never been published in the Louisville & Nashville terminal tariffs, but, on the other hand, have been applied to and from Shops Junction, which point is reached by the Louisville & Nashville only, through the operations of the Nashville terminals and over the rails of the Nashville, Chattanooga & St. Louis. It is fairly arguable, therefore, that the Louisville & Nashville also has applied its local rates as switching charges. But if defendants have voluntarily opened their terminals to Tennessee Central traffic they are not

being compelled to do so. *M. & M. Asso.* v. *P. R. R. Co.*, 23 I. C. C., 474; *Traffic Bureau of Nashville, Tenn.*, v. *L. & N. R. R. Co.*, *supra*; *Botsford & Barrett* v. *P. R. R. Co.*, 29 I. C. C., 469; *Seattle Chamber of Commerce* v. *G. N. Ry. Co.*, 30 I. C. C., 683.

The virtually prohibitive charges imposed by defendants for switching competitive Tennessee Central traffic at Nashville cause Nashville shippers little direct pecuniary loss. Industries located on any of the three lines can avoid the switching charges imposed by the others by shipping over the line on which they are located. They are subject, however, to all the disadvantages of service by a single railroad. Shipments are frequently misrouted. If the railroads are shown to be at fault, delivery is made by drays at the railroad's expense, but only after the consignee has prepaid all charges, including drayage charges, and provided the consignee has notified the railroad of the error in routing before accepting the shipment. Delivery is delayed and frequently goods are damaged by drayage. Lumber merchants located on defendants' lines can not profitably take advantage of the milling-in-transit service accorded at Nashville by the Tennessee Central. Shipments may be delayed because of a car shortage on one line, although another line has a surplus of cars. Industries located on one line lose customers at other points who prefer shipment over the other lines. These disadvantages to shippers affect Nashville as a city and hinder its growth as an industrial center.

Under all of the circumstances disclosed we are of the opinion and find that defendants' refusal to switch competitive traffic to and from the Tennessee Central at Nashville on the same terms as noncompetitive traffic while interchanging both kinds of traffic on the same terms with each other is unjustly discriminatory, and that so long as defendants switch both competitive and noncompetitive traffic for each other at Nashville at a charge equal to the cost of the service, exclusive of fixed charges, the charges imposed for switching Tennessee Central traffic should not exceed the cost of the service performed.

Since defendants impose no charge upon shippers for the service performed by the Nashville terminals they virtually absorb the charges which they impose upon each. The charges imposed by the Tennessee Central for switching defendants' traffic are not absorbed, either in whole or in part. However, discrimination in the matter of the absorption of charges is not alleged in the complaint nor discussed in the record and therefore can not be considered.

It appears that there are more than 20 industries at Nashville which the Nashville terminals and the Tennessee Central both serve, over the same lead tracks. There is no evidence, however, that these

industries are unduly preferred to the detriment of other industries at Nashville.

The Tennessee Central switches competitive and noncompetitive grain to and from defendant's lines from and to the Hermitage elevator located on its tracks several miles north of Shops Junction at a charge of $2 per car, but refuses to accord this rate to other grain dealers located on its tracks at Nashville. Complainants challenge the discrimination. The conditions are not identical, but we do not find that they are sufficiently dissimilar to justify different switching charges. We find that the Tennessee Central unduly prefers the Hermitage elevator.

An order will be entered in accordance with the conclusions herein expressed.

HARLAN, *Chairman*, dissents.

## ORDER.

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 1st day of February, A. D. 1915.

No. 6484.

CITY OF NASHVILLE AND TRAFFIC BUREAU OF NASHVILLE

*v.*

LOUISVILLE & NASHVILLE RAILROAD COMPANY; LOUISVILLE & NASHVILLE TERMINAL COMPANY; NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY; NASHVILLE TERMINAL COMPANY; TENNESSEE CENTRAL RAILROAD COMPANY; AND H. B. CHAMBERLAIN AND W. K. McALISTER, RECEIVERS THEREOF.

This case being at issue upon complaint and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

*It is ordered*, That defendants Louisville & Nashville Railroad Company, Nashville, Chattanooga & St. Louis Railway, and Louisville & Nashville Terminal Company be, and they are hereby, notified and required to cease and desist, on or before May 1, 1915, and thereafter to abstain, from maintaining a practice whereby they refuse to switch interstate competitive traffic to and from the tracks of the Tennessee Central Railroad Company at Nashville, Tenn., on the same terms as interstate noncompetitive traffic, while interchanging both kinds of said traffic on the same terms with each other, as said practice is found by the Commission in its said report to be unjustly discriminatory.

*It is further ordered*, That said defendants Louisville & Nashville Railroad Company, Nashville, Chattanooga & St. Louis Railway, and Louisville & Nashville Terminal Company be, and they are hereby, notified and required to establish, on or before May 1, 1915,

upon notice to the Interstate Commerce Commission and to the general public by not less than 30 days' filing and posting in the manner prescribed in section 6 of the act to regulate commerce, and thereafter to maintain and apply to the switching of interstate traffic to and from the tracks of the Tennessee Central Railroad Company at said Nashville, rates and charges which shall not be different than they contemporaneously maintain with respect to similar shipments to and from their respective tracks in said city, as said relation is found by the Commission in its said report to be nondiscriminatory.

*It is further ordered*, That defendants Tennessee Central Railroad Company and its receivers, H. B. Chamberlain and W. K. McAlister, be, and they are hereby, notified and required to cease and desist, on or before May 1, 1915, and thereafter to abstain, from charging, demanding, collecting, or receiving any greater switching charges to and from other points on the tracks of the Tennessee Central Railroad Company at Nashville, Tenn., on interstate shipments of grain than are contemporaneously in effect on such shipments to and from the Hermitage elevator located on said tracks, as the present relation of such switching charges is found by the Commission in its said report to be unjustly discriminatory.

*It is further ordered*, That said defendants mentioned in the next preceding paragraph hereof be, and they are hereby, notified and required to establish, on or before May 1, 1915, upon notice to the Interstate Commerce Commission and to the general public by not less than 30 days' filing and posting, in the manner prescribed in section 6 of the act to regulate commerce, and thereafter to maintain and apply switching charges to and from other points on the tracks of the Tennessee Central Railroad Company at said Nashville on interstate shipments of grain which are no higher than the switching charges contemporaneously in effect on such shipments to and from the Hermitage elevator located on said tracks, as such relation is found by the Commission in its said report to be nondiscriminatory.

*And it is further ordered*, That this order shall continue in force for a period of not less than two years from the date when it shall take effect.

By the Commission.

[SEAL.]

GEORGE B. MCGINTY,
*Secretary.*

## SUBJECT INDEX.

## LIST OF CASES.

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1914.

No. 673.

---

LOUISVILLE & NASHVILLE RAILROAD COMPANY AND NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY, - - - - - - - - - *Appellants,*

*versus*

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, CITY OF NASHVILLE, ET AL., - - - - - - - - - - *Appellees.*

---

**Appeal from the District Court of the United States for the Middle District of Tennessee.**

---

## BRIEF FOR APPELLANTS IN REPLY TO BRIEF FOR INTERVENERS.

---

### STATEMENT.

Interveners devote practically their entire brief to their contentions—

(1) That the ultimate findings of fact or conclusions of the Commission as to reasonableness or discrimination are not subject to judicial review, and—

(2) That appellants forfeited their right to relief because they did not bring up the voluminous record before the Commission.

They discuss only casually the really important questions—

(3) As to whether or not the Commission had jurisdiction to make the order as to rates upon the facts found, and—

(4) As to whether or not the Commission had jurisdiction to make the order with respect to switching practices upon the facts found and existing in that regard.

In replying upon these four points we shall almost necessarily have to reiterate some of the arguments made in our original brief, but we will endeavor to avoid repetition as far as possible.

## BRIEF AND ARGUMENT.

### Points in Reply Brief.

(1) The ultimate findings of fact or conclusions of the Interstate Commerce Commission, as to reasonableness or discrimination, are subject to judicial review.

(2) It was not necessary nor even desirable upon the motion for an interlocutory injunction to bring up the voluminous record before the Interstate Commerce Commission.

(3) The facts found, with respect to the rate order, do not, as a matter of law, support the order fixing rates, and the Commission was without jurisdiction to make that order.

(4) The facts found, with respect to the order as to switching practices, do not, as a matter of law, support that order, and the Commission was without jurisdiction to make the order as to switching practices.

## ARGUMENT.

### I.

### The Ultimate Findings of Fact or Conclusions of the Interstate Commerce Commission, as to Reasonableness or Discrimination, are Subject to Judicial Review.

Under the Fifteenth Section of the Act to Regulate Commerce, the Commission's *jurisdiction* to make the orders depends *in every case* upon the existence of unreasonableness or of unjust discrimination in the rates and practices under investigation.

If, therefore, the Commission's ultimate conclusions as to reasonableness and discrimination are not subject to judicial review, the *jurisdiction* of the Commission to make orders respecting rates or practices is not subject to judicial review *in any case*.

When, therefore, appellees contend that the Commission's findings of unreasonableness or of unjust discrimination are *conclusive upon the court,* they contend too much. *They contend in effect that no conclusions or orders of the Interstate Commerce Commission are subject to judicial review.*

And, as we said in our original brief (page 30), such a proposition carries its own refutation. This argument of appellees affords yet another manifestation of the tendency to which this court directed attention in the *Intermountain Rate cases,* 234 U. S. 476, 490, to seek to maintain and aggrandize a power by insisting upon propositions which, if they were accepted, would

**raise the gravest questions as to the constitutional validity of the asserted power.**

Of course, as was indicated by this court, in the cases of *United States* v. *L. & N. R. R. Co.*, 235 U. S. 314, and *Interstate Commerce Commission* v. *Union Pacific Railroad Co.*, 222 U. S. 541, the courts will not substitute their judgment for that of the Commission in cases where its conclusions are supported by evidence, but when the facts found do not support the conclusion, or if, as this court said in case of *Interstate Commerce Commission* v. *L. & N. R. R. Co.*, 227 U. S. 88, 91, "*the facts found do not as a matter of law support the orders made*"; the court will interfere.

Congress could not, if it would, make the findings of the Commission *conclusive* upon the courts. The fixing of a rate for the future is a legislative act, but the question of the reasonableness of a rate is eminently a question for judicial investigation. *C., M. & St. P. R'y* v. *Minnesota*, 134 U. S. 456; *Ex Parte Young*, 209 U. S. 123. For Congress to provide that the findings of the Interstate Commerce Commission as to reasonableness or discrimination should be conclusive upon the judiciary would be an infringement upon the exclusive province of the court.

But Congress never intended to make the findings of the Commission *conclusive*. We show in an appendix hereto certain extracts from the debates upon the Hepburn Bill, and we submit that these extracts and the full debates themselves and the whole history of our legislation affecting interstate commerce, all show that, while

Congress clearly intended to give the Commission the power to fix rates for the future, a power which the Commission did not at first possess, Congress has never intended to change the rule as to review of the Commission's findings of fact by the judicial power of the government.

In our original brief (pages 33-36) we drew attention to a number of cases in which this court has reviewed and reversed the Interstate Commerce Commission's ultimate findings of fact or conclusions as to reasonableness or discrimination.

In the *Florida East Coast Railway case,* 234 U. S. 167, an ultimate finding or conclusion of the Commission as to the reasonableness of certain freight rates on the Florida East Coast Railway was reviewed and overturned. In that case the Commission had held, *Florida Fruit and Vegetable Shippers* v. *A. C. L. R. R. Co.,* 22 I. C. C. 11, 19:

> "The financial condition of the Florida East Coast Railway has been referred to at considerable length in our previous opinions in No. 1168, and it would not be profitable to discuss that subject further here.
>
> "Taking that into account, *together with all the other facts and circumstances bearing upon the matter,* we are of the opinion that the rates suggested for the Seaboard Air Line and the Atlantic Coast Line in the State of Florida would be just and reasonable to apply upon the railroad of the Florida East Coast Railway Co. *Those rates are already in effect upon pineapples and do not involve any extraordinary reductions from rates on vegetables and*

*citrus fruits which that company has voluntarily established.*" (Italics are ours.)

The report and order of the Commission under consideration by this court in the *Florida East Coast Railway case* were made on a supplemental petition in a controversy twice before heard and decided by the Commission, which controversy involved the rates on pineapples, citrus fruits and vegetables from Florida producing points to exterior points of distribution or consumption. The rates referred to in the quotation, *supra*, "as just and reasonable rates to apply upon the Florida East Coast Railway Co." were "gathering" rates upon *citrus fruits* and *vegetables* up to Jacksonville when destined for points beyond. The Commission made three reports in the case, No. 1168, as follows:

*Florida Fruit & Vegetable Shippers* v. *A. C. L. R. R. Co.*, 14 I. C. C. 476, June 25, 1908.
*Florida Fruit & Vegetable Shippers* v. *A. C. L. R. R. Co.*, 17 I. C. C. 552, February 8, 1910.
*Florida Fruit & Vegetable Shippers* v. *A. C. L. R. R. Co.*, 22 I. C. C. 11, November 6, 1911.

The record before this court consisted of the three reports of the Commission, the testimony taken before the Commission in the last hearing, and the testimony taken in the Commerce Court. The testimony taken in the two earlier hearings before the Commission was not in the record. It was stipulated that the facts stated by the Commission in its reports relating to those hearings should be taken as the facts of record therein.

Under Section 16 of the Act to Regulate Commerce, the Commission is authorized "to suspend or modify its orders upon such notice and in such manner as it shall deem proper."

Section 16a of the Act provides that after a *decision*, order, or requirement has been made by the Commission in any proceeding, any party thereto may at any time make application for rehearing of the same, or any matter determined therein. And if, in its judgment, after rehearing and the consideration of *all* facts, including those arising since the former hearing, it shall appear that the original *decision*, order, or requirement is in any respect unjust or unwarranted, the Commission may reverse, change, or modify the same accordingly.

The Commission in its first decision unquestionably held that the rates on pineapples, citrus fruit and vegetables up to Jacksonville were as low as they ought to be under all the circumstances (234 U. S. 176-178).

The Commission in its last *decision* unquestionably held that the same rates were unjust and unreasonable to the extent that they exceeded the rates which would result from the application of the distance tariff prescribed by it (22 I. C. C. 20).

With respect to the rates on pineapples on the East Coast Line the Commission decided to strike off its holding as to reasonableness and to take the whole matter under advisement. An order was passed to that effect, the parties were so notified, and were fully heard in proof and in argument (17 I. C. C. 559).

And the Commission averred that it reversed its decision as to the rates of the Florida East Coast Railway on vegetables and citrus fruits after taking into account the financial condition of that line together with *all the other facts* and circumstances bearing upon the matter (22 I. C. C. 19).

We have not the records before the Commission and Commerce Court, but from the reports of the Commission, from the abstract of argument for the United States (234 U. S. 168) and from the opinion of this court it appears that upon the rehearing the record showed the following facts:

*Comparisons.*

Comparisons of rates on oranges from California and Florida to the same consuming points showed that the actual rate paid by the California fruit was less per box than that paid by the Florida fruit, although the distance is twice as great. The rate from California was higher than the Commission had previously found to be reasonable. The total rates from Arcadia, Fla., a representative shipping point, to New York, a distance of 1,242 miles, was 75½ cents, of which one-third represented the movement up to Jacksonville. The "gathering" movement averaged a distance of 200 miles and a charge of 25 cents. From this and from other comparisons which were afforded it appears that for the *same car*, the earnings per car mile or per ton mile for the movement up to Jacksonville were twice as great as for the movement beyond. Similar comparisons were afforded for rates on

vegetables and pineapples (14 I. C. C. 480-483, 501-503).

The average receipts of the Atlantic Coast Line for the year ending June 30, 1907, were 1.235 cents per ton mile, and of the Seaboard Air Line 1.118 cents per ton mile (14 I. C. C. 489-490). These were compared with the revenue per ton mile on oranges from Jacksonville to Richmond, 1.38 cents, and comparisons of these results with a ton-mile revenue of 3.125 cents arising from a rate of 25 cents per 80-pound box for a haul of 200 miles would be no more absurd than are the ton-mile and car-mile comparisons made in the Commission's findings of fact in the present case. Comparisons of earnings per car and per train on different commodities were also afforded, but they were not relevant to the reasonableness of the charge up to Jacksonville, just as they are not relevant in the present case.

Comparisons were also afforded of the rate up to Jacksonville with the divisions of the through rate applying for other parts of the haul (14 I. C. C. 487, 490-491).

The finding of the Commission in its first report (234 U. S. 175, 14 I. C. C. 483-4) with reference to the shape and location of the State of Florida, the density of traffic, through connections and business, and the nature of the traffic originated and received related alike to the Florida East Coast Railway, the Seaboard Air Line and the Atlantic Coast Line. While the gross earnings of the Atlantic Coast Line were greater in other States they were only $4,210.00 per mile in the State of Florida (14 I. C. C. 488). And the following comparisons per mile of road

are available from page 484 of the Commission's first report:

| | Seaboard Air Line | Atlantic Coast Line | Florida East Coast Railway |
|---|---|---|---|
| Receipts . . . | $5,000.00 | $4,200.00 | $5.911.00 |
| Expenses . . . | 3,900.00(78%) | 3,150.00(75%) | 4,502.00 |
| Net . . . . . | 1,100.00 | 1,050.00 | 1,409.00 |

The East Coast Line exceeded the other two roads in earnings, both gross and net, per mile.

> "During the season of 1910, the Atlantic Coast Line handled 2,901,936 boxes of citrus fruits and 1,500,000 miscellaneous crates; total 4,401,936. The Florida East Coast handled 669,584 boxes of citrus fruits, 600,000 crates pineapples, and 1,890,000 miscellaneous crates; total 3,159,584. The Seaboard Air Line handled 780,387 boxes of citrus fruits and 1,391,335 miscellaneous crates; total 2,171,722. In the volume of traffic handled the appellant stands between the Atlantic Coast Line and the Seaboard Air Line." (*Abstract Argument for U. S.*, 234 U. S. 169.)

*Financial Conditions of the Florida East Coast Railway.*

From the second report of the Commission, rendered February 8, 1910, the following facts appear as to the financial condition of the Florida East Coast Railway Company at that time. The capitalization was $33,000,000, which, with the exception of about $4,000,000, represents an actual cash investment; eliminating $14,000,000 for the line south of Miami, the property had never earned in any year 6 per cent upon the investment with the

single exception of the year 1909 (17 I. C. C. 564, 234 U. S. 180).

From the abstract of argument for the United States (234 U. S. 170) it appears that there had been a considerable improvement before the Commission's last report, rendered November 6, 1911. For the year ending June 30, 1911, the net operating revenue from the main line was $1,272,908.19. According to showing made by the East Coast Line, that sum would more than pay a dividend of 8 per cent on the capitalization of $15,000,000 for the main line.

*With Particular Relation to the Rates on Pineapples.*

The Florida East Coast Railway, with its connections, maintained a rate of 66½ cents from Habana to Chicago out of which the East Coast Line and its connections north of Jacksonville received an amount less than the charge for Florida pineapples, although the distance is greater and the service practically the same. But the Commission recognized that this forced rate could not be taken as a standard by which to measure the reasonableness of a rate upon local business (17 I. C. C. 566) just as we are now contending that the Commission can not take the forced rates on coal to Memphis and Louisville as standards by which to measure the reasonableness of the local rate on coal to Nashville.

The vice-president of the Florida East Coast Railway stated that he had always thought that carload rates should be established and that in his opinion to establish

carload rates 3 cents per box less than the existing any-quantity rates would not prejudice the net revenues of his company (17 I. C. C. 565).

*With Respect to the Proper Relation of Rates on Vegetables and Citrus Fruits to the Rates on Pineapples.*

In its first report the Commission saw no reason why its holding with respect to rates upon citrus fruits should not apply also to pineapples. The service rendered is exactly the same. The character of the fruit is such that it requires a service of practically the same character as the orange (14 I. C. C. 503).

All the incidents of transportation of pineapples and oranges are the same; the value of the two commodities is practically the same (17 I. C. C. 563).

Vegetables are somewhat more bulky than oranges (14 I. C. C. 496).

But the Commission did not base its final decision upon any of these facts. It based its ultimate action upon what it understood to be changed conditions with respect to:

a. The rates established by the Florida Railroad Commission and the opinion of that Commission relating thereto and (22 I. C. C. 14).
b. The effect upon traffic up to the base point of carload rates which had been established from the base point to destinations (22 I. C. C. 15).

And this court did not go into the detail of all the facts which might be shown by the record to support the Commission's conclusions but regardless of the Commis-

sion's indication (22 I. C. C. 19) that it had considered all the facts, had recourse to the last *report* (234 U. S. 183) and *upon the face of that report* determined the *ratio decidendi* to be "changed conditions." And the court's review of the testimony in the last proceeding was limited to the analysis of the primary facts as to changed conditions including: (a) The testimony of the Chairman of the Florida Railroad Commission that there had been a considerable increase in the volume of traffic; (b) a further statement or admission by an officer of the East Coast Line as to saving in cost of loading carload shipments; and (c) testimony with reference to the Atlantic Coast Line and the Seaboard Air Line (but none as to the East Coast Line) to the effect that on those roads it had come to pass that there was a saving in expense and an increase in earning capacity. And this court weighed the primary facts so limited and determined and because they did not support the conclusion of the Commission remanded the case with directions to restrain the enforcement of the Commission's order.

While this court has used language which dissociated from the cases in which uttered might seem to indicate that the findings of the Interstate Commerce Commission upon questions of reasonableness or discrimination are conclusive, the whole course of the court in such cases shows otherwise and we repeat the maxim as to unnecessarily broad language uttered by Chief Justice Marshall in a similar connection. *Cohens* v. *Virginia,* 6 Wheat. 399;

"It is a maxim not to be disregarded that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision."

## II.

### It Was Not Necessary Nor Even Desirable upon the Motion for an Interlocutory Injunction to Bring up the Voluminous Record before the Interstate Commerce Commission.

We have shown how in the *Florida East Coast Railway case*, 234 U. S. 167, this court ignored all facts except those directly involved in the doctrine of the case as set forth on the face of the Commission's report.

In many cases involving the orders of the Interstate Commerce Commission that which purports to be an ultimate conclusion of fact is in reality so interwoven with the question of law as to be in substance a decision of the latter. We think the present case is such a case. And as the questions involved here are not questions of fact, but questions of power, the elements of the matter are, as this court said in the case of *Interstate Comm. Com.* v. *C., R. I. & P. R'y*, 218 U. S. 88, 101, "on the face of the report of the Commission."

The orders of the Commission may take effect within thirty days and continue in force not more than two years. (Section 15, Act to Regulate Commerce.) Suits to set aside such orders are commenced by filing in the proper

District Court a petition, copies of which must be served by the Marshal of the District of Columbia by filing in the office of the Secretary of the Interstate Commerce Commission and in the Department of Justice (Sec. 209, Judicial Code. Same rule now as to District Courts.) No interlocutory injunction in such cases can be issued unless the application for same shall be presented to a circuit or district judge and shall be heard and determined by three judges. When such application is presented to one judge, he must call to his assistance two other judges, and when plaintiff learns what date will be convenient for the three judges to convene, he must give at least five days' notice of the hearing to the Interstate Commerce Commission to the Attorney General and to such other persons as may be defendants in the suit. It requires considerable time to get together even an ordinary record before the Commission, including transcript and exhibits, and to have such record checked and verified by the Secretary of the Commission. By reference to page 6 of the brief for interveners it will be noted that in addition to the regular record in this case *there were stipulated into the instant record the records in five other important cases and any record in the office of the Commission.* It was manifestly a physical impossibility to produce this record upon the interlocutory motion. Such production was not necessary and would, it seems, have been contrary to the spirit of the new equity rules, and particularly of the rules relating to the reduction of the record on appeal.

The answer of the United States (Transcript of Record, printed page 55) shows that all the facts upon which the orders complained of were based are embraced within the Commission's report. Respondent says:

> "Further answering the said petition, respondent alleges that the matters and things alleged therein and sought to be put in issue were all before the Interstate Commerce Commission, and were fully heard and determined by it. They were within its power and authority to hear and determine under the provisions of the Act to Regulate Commerce. *In its report in writing with respect thereto,* made after a full hearing and investigation and after due notice to all of the parties, which states its conclusions, together with its decision, orders or requirement in the premises, *the matters and things of which complaint is made were fully considered and foreclosed by findings of fact;* based on substantial evidence."

## III.

**The Facts Found with Respect to the Rate Order Do Not, as a Matter of Law, Support the Order Fixing Rates, and the Commission was without Jurisdiction to Make that Order.**

The jurisdiction of the Commission to make the rate order depends upon the unreasonableness of the rate which had been charged by the carriers. This is not a case in which the carriers are seeking to increase the rate. The presumption of right conduct attaches to the rate which the carriers had in effect, and the burden is upon those who seek to show that the rate in effect was unreasonable. It is not sufficient to sustain the jurisdic-

tion of the Commission, that the 80-cent rate or the 90-cent rate which the Commission fixed may be reasonable or might have been reasonable if established by the carriers. The Commission must go further, and its jurisdiction must be supported by a finding upon reasonable principles that the $1.00 rate is an unreasonable rate. There is a difference between the weight of fact necessary to confer jurisdiction upon the Commission to change the rate, by showing that the rate in effect is unreasonable, and the weight of fact necessary to sustain the reasonableness of the rate fixed by the Commission, when once its jurisdiction has been established. The investigation in the former case is essentially judicial in its nature. The fixing of a rate for the future is a legislative act.

We do not merely contend that all of the findings must be taken as a chain to support the order, and that the breaking of the inference as to any link or finding destroys the whole; we contend that the findings of fact made in the report are, as they are shown by the answer of the United States to be, all of the facts upon which the Commission based its orders; and we contend that those findings of fact, whether taken singly or in groups or as a whole, do not afford any inference supporting or tending to support a conclusion that the rate of $1.00 is an unreasonable rate, and that, therefore, the Commission was without jurisdiction to make the order as to the coal rates.

The report of the Commission (Record, printed pages 62, 63) first dismisses as without probative value the

mass of irrelevant statistics offered by complainants, and then the Commission clearly and expressly sets out the findings of fact upon which its conclusion and orders were based. We have in our original brief (pages 4-11) set out in full the Commission's four findings of fact with reference to the coal rates. And the analysis of those findings of fact made in our original brief (pages 41-50) shows that those facts do not support or tend to support a conclusion of unreasonableness or an order of the Commission based upon the unreasonableness of existing rates.

The analysis of the *Florida East Coast Railway case, supra,* shows that the Commission in the present case did not have nearly as much upon which to base a conclusion of unreasonableness as it had in that case. This court set aside the order of the Commission in the Florida East Coast Line case. The Commission in the present case, as it did in the Florida East Coast Line case, has simply gotten out of the realm of legitimate regulation, and has endeavored to constitute itself the general manager and the traffic manager of the railroad.

Just as in the Florida East Coast Line case, it was apparent that the real basis of the Commission's order was a supposed change in conditions which this court found did not exist or was not proven, so in the present case it is apparent that the real basis of the Commission's decision as to the Nashville Coal Rate is, that in the Commission's opinion (Record, printed page 66) there *ought to be* at Nashville as keen railroad competition as there is at Memphis, and this regardless of the fact that the

short line of the Frisco from the Alabama fields, which the Commission finds to be controlling at Memphis, does not exist at Nashville, and there is not shown to be any corresponding competition at Nashville, according to the Commission's own report. This court has repeatedly said that competition to be effective upon rates must be actual and controlling, and not merely conjectural. The Commission is attempting to create competition at Nashville by administrative fiat.

In the case of *Mount Pleasant Fertilizer Company, et al.,* v. *Louisville & Nashville Railroad Company,* No. 6186, before the Interstate Commerce Commission, which was decided on July 31, 1914, Unreported Opinion A-748, the Commission sustained a rate of $1.40 per ton from these same Kentucky mines to Mt. Pleasant, Tenn., 57 miles south of Nashville, and dismissed the complaint. In that case the Commission found that the rate of $1.10 to Memphis was a *compelled* rate to meet the competition of carriers bringing coal into Memphis from mines in Alabama, and that in this respect the conditions at Mt. Pleasant are dissimilar to the conditions existing at Memphis, and the Commission found that the rates to Memphis are also influenced by the fact that Memphis is situated on the Mississippi River, and said that the effect of this water competition had been recognized by the Commission in numerous cases, and that traffic moving to Mt. Pleasant is not affected by competition of this kind.

It is clear, therefore, that the Commission does not consider the rate to Memphis as the proper standard by which to measure the rate to a non-competitive point, or

to a point where the conditions are dissimilar to those which exist at Memphis. It is equally clear that in order to make the comparison with Memphis in the Nashville case, the Commission substituted for the actual circumstances and conditions at Nashville (Record, page 66) a possible or conjectural competition which did not exist, but which the Commission thought *ought* to exist; that is the Commission seeks to create by fiat that which does not exist as a fact. This is the same effort which was made by the Commission in the old Nashville Coal Case, and which was condemned by the United States Court in that case. *Interstate Commerce Commission* v. *Louisville & Nashville Railroad Company,* 73 Fed. 409. The proposition may be newly garbed, but it is the same old proposition.

But even if the opinion of the Commission that there *ought to be* equally as keen railroad competition at Nashville as at Memphis were relevant, there is nothing to sustain that opinion, and that opinion is directly contradicted as regards the traffic in controversy by the Commission's own findings of fact.

The Commission says (Record, page 69):

> "The Illinois Central does not reach Nashville. Its rails from Western Kentucky extend only about half way, and the traffic is turned over to the Tennessee Central at Hopkinsville, Ky. This route is 58.5 miles longer than the Louisville & Nashville, from the same field, and 27 miles in excess of the Nashville, Chattanooga & St. Louis haul from East

> Tennessee and Alabama. Besides it embraces two separate and distinct carriers. Furthermore, little attack was made on this rate, complainants confining themselves almost entirely to the Louisville & Nashville and the Nashville, Chattanooga & St. Louis rates. Under all the circumstances, we can not find, upon this record, that the Illinois Central-Tennessee Central rate is unreasonable."

Appellants are the shortest and, therefore, naturally the rate-making lines on coal to Nashville. In the face of this fact, it can not reasonably be said that there ought to be equally as keen railroad competition at Nashville as there is at Memphis.

The Commission has not been consistent in its holdings as to rail competition at Nashville. In the case of *Bowling Green Business Men's Protective Association* v. *Louisville & Nashville Railroad Compaiy,* 24 I. C. C. 288, 238-239 (*L. & N. R. R.* v. *U. S., et al.,* No. 280, October Term, 1914, Supreme Court), the Commission dismissed as of no effect against appellant, Louisville & Nashville Railroad Company, rail competition at Nashville, with respect to traffic as to which said appellant is not the rate-making line. In the present case, the Commission seeks to establish arbitrarily controlling competition on coal from the Western Kentucky fields as to which said appellant is the natural rate-making line, its route being 58.5 miles shorter than that of its competitors the Illinois Central and Tennessee Central (Record, page 69).

The Commission finds (Record, p. 65) that a rate not lower than $1.40 to Memphis resulted from water competition of the Mississippi River. Therefore, a rate to Memphis even as low as $1.40 could not be used as a standard to measure the Nashville rate. *A fortiori*, the *lower* rate compelled by the Frisco competition can not be so used.

And the same inconsistency exists with respect to the comparisons which the Commission seeks to institute between the Nashville rate and the Louisville rate. Inasmuch as the Louisville & Nashville is the rate-making line to Nashville from the Western Kentucky coal fields and the shortest competing line, Illinois Central-Tennessee Central, is 58.5 miles longer, and the Commission was unable to find that a rate of $1.00 via the Illinois Central-Tennessee Central is unreasonable (Record, p. 69), Nashville is, as far as coal from the Western Kentucky mines is concerned, practically a local station on the Louisville & Nashville Railroad. In the case of *Lebanon Commercial Club* v. *Louisville & Nashville Railroad Company, et al.*, 28 I. C. C. 301, which was decided by the Commission less than two months before its decision in the present case, complaint was made of rates via the Louisville & Nashville Railroad Company from the Tennessee and Virginia coal fields to Lebanon, Ky., as compared with the rates to Louisville, Ky. From the table of comparative rates shown on page 302 of the Commission's report, the following comparisons may be taken as illustrative:

From Jellico, Tenn., to Lebanon, Ky., the rate on all grades of coal was.....$1.20

From the same point of origin to Louisville, Ky., the rates were—

| | |
|---|---|
| On slack or nut and slack mixed ..... | .75 |
| On run-of-mine ..... | .85 |
| On other grades ..... | .95 |

The geographical situation of Lebanon and of Louisville appear from map filed with our reply brief with respect to that part of the order as to switching practices which requires the Louisville & Nashville Railroad Company to switch the competitive coal shipments of the Tennessee Central Railroad Company. The distance to Lebanon from Jellico is 67 miles less than the distance to Louisville from Jellico (28 I. C. C. 301), and coal for Louisville goes right by Lebanon.

In the Lebanon Coal Case, the Commission refused to hold the higher rates to Lebanon unjustly discriminatory as compared with the lower rates to Louisville, Ky., although Lebanon, Ky., is an intermediate point, 67 miles nearer to the mines than is Louisville. We quote from the report of the Commission in the *Lebanon Coal Case*, 28 I. C. C. 301-304, as follows:

> "The petitioner, an organization of those interested in furthering the common interests of Lebanon, Ky., and of its vicinity, attacks the rate on bituminous coal to Lebanon from Big Stone Gap, Stonega, and Norton, Va., and from Cotula, Jellico and Habersham, Tenn., as unjust and unreasonable *per se*. As a second ground of complaint it says that rates from these points to Louisville vary according to the grade

of coal shipped whether (*a*) slack, or nut and slack mixed, (*b*) run of mine, (*c*) all other grades of coal; whereas to Lebanon the one rate governs the carriage of coal of all grades, to the consequent disadvantage and prejudice of that city. The third ground of complaint is that the rates from points of origin in the States of Virginia and Tennessee to Lebanon are greater in the aggregate, than the rates for the transportation of like grades of coal from the same sources, over the same lines of railroad and in the same direction to Louisville (67 miles beyond Lebanon), the haul to Lebanon being included within the haul to Louisville, all in violation of the third and fourth sections of the act. * * *

"The table following shows comparatively the rates here in question, in cents per net ton of 2,000 pounds, on bituminous coal:

| FROM | To Lebanon, Ky. on all grades | To Louisville, Ky. | | |
|---|---|---|---|---|
| | | Slack or nut and slack mixed | Run of Mine | Other Grades |
| Stonega, Va ..... | 140 | 95 | 105 | 115 |
| Big Stone Gap, Va .... | 130 | 85 | 95 | 105 |
| Norton, Va ..... | 130 | 85 | 95 | 105 |
| Jellico, Tenn ..... | 120 | 75 | 85 | 95 |
| Cotula, Tenn ..... | 125 | 75 | 85 | 95 |
| Habersham, Tenn ..... | 125 | 75 | 85 | 95 |

"Defendant further showed, taking the rates from Jellico as illustrative, that Lebanon has precisely the same rate as similarly located points in Kentucky, and that no such point has a rate lower than that to Lebanon. Another showing by defendant indicates that these rates furnish no higher return than do other rates in this territory by way of other railways. * * *

* * * "The Commission is forced to agree with the contention made by the Louisville & Nashville in its brief that complainant bases its entire case upon the issue of comparative unreasonableness. * * *

* * * "The Commission finds the record quite bare of anything that will enable it to determine the extent to which the Lebanon rate should be allowed to exceed the Louisville rate. It must also be remembered that any change which may be made in the existing differentials will necessarily reflect into the rates to other Louisville & Nashville points, intermediate, as is Lebanon, to Louisville. * * *

"The Louisville market appears to be controlled by the movement of coal by river at a very low transportation cost, and by the movement of coal from Western Kentucky mines at a rate of 60 cents per ton by the Illinois Central Railroad. These conditions appear to compel the Louisville & Nashville to make a low rate to Louisville on slack coal and on nut coal and slack coal mixed, but permits a somewhat higher rate on other grades.

"An examination of the tariffs of the Louisville & Nashville Railroad Company discloses that Lebanon, in this respect, is in no different position from the other local Louisville & Nashville points. Also, the present rates to Lebanon appear to be so constructed as to equalize the former refund on steam coal. On this record the Commission can not say that the present graded rates to Louisville result in unjust discrimination against Lebanon.

"In accordance with the conclusion announced herein, the petition will be dismissed."

Surely if rates varying from $1.20 per ton to $1.40 per ton for shipments of bituminous coal from the Eastern Coal fields on the Louisville & Nashville to Lebanon are not unreasonable as compared with the rates to Louisville, Ky., and if no similarly located points in Kentucky

have a lower rate than that to Lebanon, and if these rates furnish no higher return than do other rates in this territory by way of other railroads, and if the tariffs of the Louisville & Nashville Railroad Company disclose, as the Commission says they do, that Lebanon in respect to graded rates is in no different respect from the other local Louisville & Nashville points, while the different conditions which exist at Louisville result in different practices at that point, the rates to Louisville, Ky., can not be even remotely connected in any way with the rates to Nashville, Tenn., which, as far as coal rates are concerned, is substantially a local point on the Louisville & Nashville Railroad.

In its report in the present case (Record, p. 67), the Commission refers by way of rebuttal of certain transportation costs stated in this case to its findings in the case of *Slider* v. *Southern Railway Co.*, 24 I. C. C. 312, 313. Appellants were not parties to that proceeding, and were not even remotely concerned in the issues therein. The Commission will probably justify its use of its finding in that case (as to the merits of which we know nothing), by the stipulation referred to on page 6 of interveners' brief that "*any record in the office of the Commission might be considered in this case.*" If such be the case, appellees can not object to our treating as part of the record in this case the findings and conclusions of the Commission in the Mt. Pleasant Case and in the Lebanon Coal case, which we have cited, or in the last Nashville Switching case which we shall hereafter refer to in connection with the switching order.

The Memphis Coal Case, *Memphis Freight Bureau* v. *L. & N. R. R. Co.*, 26 I. C. C. 402, is also referred to in the Commission's report in the present case (Record, p. 65). And counsel for the Interstate Commerce Commission say (page 15 of their brief) "the record in that case was made a part of the record in this case. The judges were furnished with a copy of that report, dated December 3, 1912."

It appears from the testimony of Mr. Geo. W. Lamb (Record, pp. 78-80) that he testified in the Memphis Coal Rate Case, and that it was shown by exhibit filed by him in that case, and it is true, that in spite of the increased tonnage handled in the equipment of the Louisville & Nashville Railroad Company, and in spite of the increase in the tractive power of engines, and in spite of the increased volume of tonnage, and in spite of all other circumstances tending to increase the efficiency of operation, the increased costs of labor and material have been so great that the cost of earning a dollar of revenue on the lines of the Louisville & Nashville Railroad Company, or operating expenses, increased from 60.43 cents in 1888 to 71.92 cents in 1911, and Mr. Lamb filed with his affidavit, a statement showing the results of operation of the Louisville & Nashville Railroad Company during the 33 years from July 1, 1878, to June 30, 1911, inclusive, and said that this statement is substantially the same as the statement showing similar information filed by him in the Memphis Coal Case, and marked Exhibit G. W. L. No. 40, in that case. This statement will be found opposite page 80 of the printed record herein. The report of the Com-

mission in the *Memphis Coal Rate case* shows, 26 I. C. C. 402, 405, that "voluminous exhibits, statistical and otherwise, were filed by defendants tending to show the cost of operation since 1901." The statement in the Commission's first finding of fact (Record, p. 64) that little more than a suggestion of increased cost of labor and material appears of record is irreconcilable with the statement made by the Commission in the Memphis Coal Rate Case, that voluminous exhibits, statistical and otherwise, were filed by defendants tending to show the increased cost of operation.

Standing alone, the increased tonnage capacity of cars, the increased tractive power of engines, and the increased volume of tonnage handled, stated in the Commission's first finding of fact, would not, as we submit we have shown in our original brief (pages 44-47), have afforded any inference as to the unreasonableness of the old rates, even if little more than a suggestion of increased cost of labor and material had appeared of record. When considered in connection with the Commission's report in Memphis Coal Rate Case, *supra,* and in connection with the affidavit of Mr. Lamb and with the statement made a part thereof, the Commission's finding of fact tends, if it tends either way, to justify an *increase* in the rates. No inference whatever can be drawn from that finding to justify a reduction in the lowest rate which was in effect at any time during the 25-year period.

There remains for consideration as to the rate order only the Commission's fourth finding of fact which we have set out in full and have analyzed and discussed in

pages 11, 43, 44, 48, 49 and 50 of our original brief herein. If there was no evidence to support the order of the Commission in the *Florida East Coast Line Case, supra,* there is surely nothing in the fourth finding of fact to support the order of the Commission as to coal rates in this case. The average earnings per car on oranges from—

Florida points were found to be (14 I. C. C. 489-490) in excess of.....$188.80

The average earnings per car found for the coal traffic here in controversy were (Record, page 68):

For the Louisville & Nashville ..... 41.00
For the Nashville, Chattanooga & St. Louis, 34.50.

It is beyond the compass of the human mind to draw from these facts an inference that the rates in controversy in the East Coast Line Case were reasonable rates and the rates here in controversy are unreasonable rates. With the same rate and with an assumed greater tonnage (41 tons as against 40 tons), the revenue per car mile for the line of the Louisville & Nashville, 58.5 miles shorter than the Illinois Central-Tennessee Central lines, is *necessarily* greater than the earnings per car mile of the latter line, but no inference can be drawn from that fact. The longer line necessarily has to meet the rate of the shorter line if it desires to compete for the business. In the *Florida East Coast Line Case,* as we have hereinabove shown, the revenue per car mile up to the base point, Jacksonville, for an average haul nearly twice as great as the average haul of the Louisville & Nashville

herein involved, was more than twice as much as the revenue per car mile on the same traffic beyond Jacksonville.

*There is not even a serious pretense of any finding to support the order as to the coal rates of the Nashville, Chattanooga & St. Louis Railway.*

Congress has not given to the Commission any such powers as the Commission is seeking to exercise with respect to the coal rates in this case. The carriers retain the primary right to make rates, and the presumption of fair dealing applies to the rates which the carriers have made. The Commission has not been constituted a general traffic manager for the railroads. If the Commission can do, as it is seeking to do with reference to appellants' coal rates in this case, it can make or break, not only the carriers but communities at its pleasure, and with respect to the important question of rate regulation, which touches every citizen, this will cease to be a government of laws and will become an autocracy of a Commission composed of seven men.

## IV.

**The Facts Found with respect to the Order as to Switching Practices do not as a matter of Law Support that Order, and the Commission was without Jurisdiction to make the Order as to Switching Practices.**

The facts found by the Commission as to the Nashville Switching situation are set out in full in pages 12 to 14, inclusive, of our original brief as the Commission's fifth finding of fact. Those facts, and the jurisdiction of the Commission based thereon, are discussed in pages 55 to 68, inclusive, of our original brief. Since our original brief was written there have come to our attention, the decision of this court in *Pennsylvania Company* v. *United States*, No. 591, October Term, 1914, decided February 23, 1915, and the report and order of the Interstate Commerce Commission in the Nashville Switching Case, *City of Nashville* v. *L. & N. R. R. Co.*, 33 I. C. C. 76, and we have filed a reply brief with respect to that part of the order as to switching practices which requires the Louisville & Nashville Railroad Company to switch the competitive coal shipments of the Tennessee Central Railroad Company.

In view of the stress which has been laid upon the definition of the term "Transportation," we show as part two of the appendix to this brief certain abstracts from the debates on the Hepburn Bill, from which it appears that in extending the limits of the term "Transportation," Congress had no idea whatever of abrogating the proviso of the Third Section of the Act to Regulate Com-

merce that no common carrier should be required to give the use of its tracks or terminal facilities to another carrier engaged in like business. The abstracts which we have made, and we submit, the entire history of the legislation extending the definition of the term "Transportation" show that the purpose of this extension was to empower the Interstate Commerce Commission to prevent those unjust discriminations and preferences which might arise through the ownership by shippers or receivers of freight of the facilities of transportation. Since our original brief in this case was written, the Commission has made its report *in re Financial Relations, Rates and Practices of the Louisville & Nashville Railroad Company, the Nashville, Chattanooga & St. Louis Railway and other carriers,* 33 I. C. C. 168, and in response to question No. 9 of the Senate Resolution, pursuant to which the Commission made its report, the Commission sets forth at pages 201 to 204, inclusive, a review of the very Nashville switching situation which we have here under consideration. Question 9 of the Senate Resolution called for "any fact of facts showing or tending to show whether the ownership of the Louisville & Nashville Railroad and the Nashville, Chattanooga & St. Louis Railway or any railroad terminal or terminal company, steamboat or steamboat lines, upon the Cumberland and Tennessee rivers and any dock or dock yards at Pensacola, New Orleans, Mobile or other seaport establishes a monopoly and restricts competition and determines and fixes rates." Question No. 9 of the Senate Resolution relates to matters purely within the purview of the Anti-

Trust Act. It does not concern the provisions of the Act to Regulate Commerce. Certainly the proceedings and demands of the Commission pursuant to the Senate Resolution were not conducted under authority of Section 12 of the Act to Regulate Commerce, *United States* v. *Louisville & Nashville Railroad Company*, No. 499, October Term, 1914, decided by this court February 23, 1915. It is clear we think from these facts, as well as from the reference made by the Commission in its report herein (Record, page 71), to the Terminal Railroad Association Case, that the Commission in the matter of switching at Nashville is endeavoring to administer questions arising under the Anti-Trust Act and not under the Act to Regulate Commerce, and the authority of the Commission is limited by the latter act.

But, even if the Commission had the power to administer the Anti-Trust Act, it could have no cause for complaint under that Act against the switching practices of appellant at Nashville. If appellants were required to "unscramble" their terminal arrangements at Nashville, such a course would tend to restrict or destroy competition which is afforded under the present arrangement, would in nowise increase competition, and would burden and not in any way benefit the shippers and receivers of freight at Nashville. For example, if appellants were required to separate their terminals, the shippers and receivers of freight now located on the joint terminals would have to pay switching charges which they do not now have to pay, and might lose altogether switching privileges which they now enjoy with-

out cost, and there would be no increase of benefit to the shippers and receivers of freight located on the lines of the Tennessee Central or on any other lines in Nashville. If the rate on non-competitive traffic, under the new arrangement, should remain the same, a shipper of non-competitive freight located on that part of the present joint terminals which might be distributed to the Louisville & Nashville Railroad Company, would pay on property going out over the Nashville, Chattanooga & St. Louis Railway, on which no switching charge whatever is now assessed, the switching charge of $3.00 in addition to the rate which he now pays. The change would not in anywise tend to increase competition, but would simply increase the burden of the Nashville shippers.

The Louisville & Nashville Terminal Company, one of the companies against which the order as to switching practices was made, is not an operating company. It operates neither tracks nor engines and it does not do switching for any one. The Commission is clearly without jurisdiction to order that company, as it does in the order complained of, to switch for other companies.

The Louisville & Nashville Railroad Company and the Nashville, Chattanooga & St. Louis Railway do not switch for each other. Each operates as a part of its own tracks or terminals:

(a) Tracks which it owns in fee;
(b) Tracks which it leases jointly from the terminal company; and
(c) The tracks of the other company over which it has trackage arrangements.

Each of these companies is to all intents and purposes the owner and operator for its own account of all of the joint facilities involved.

There is no switching charge in effect between the Louisville & Nashville Railroad Company and the Nashville, Chattanooga & St. Louis Railway on either competitive or non-competitive traffic.

As stated by the Commission in its report in the case of *City of Nashville* v. *Louisville & Nashville Railroad Company*, 33 I. C. C. 76, 80-81, with respect to the Nashville Terminal arrangement:

> "The arrangement is called the 'Nashville Terminals' and is managed by a board of three, composed of the general managers of the two roads and a superintendent of terminals. The total expense of maintenance and operation is apportioned monthly between the two roads on the basis of the total number of cars and locomotives of all kinds handled for each. The association is not incorporated and is not a terminal company in the sense that the principal purpose of its existence is 'to furnish terminal facilities for carriers which lack them.' It is a joint agency voluntarily constituted by the Louisville & Nashville and Nashville, Chattanooga & St. Louis for *the joint maintenance and operation of their own facilities for their own use.* The terminal tariffs of both roads publish service by the Nashville Terminals, and provide that 'there is no switching charge from locations on tracks of the Nashville Terminals within the switching limits on freight traffic, carloads, from or destined to Nashville' over either road, 'regardless of whether such traffic is from or destined to competitive or non-competitive points.' " (Italics are ours.)

We respectfully submit that any order based, as is the present order as to switching practices, upon the view that unjust discrimination *under the Act to Regulate Commerce* can arise *from the joint maintenance and operation by two companies of their own facilities for their own use,* is an order which the Interstate Commerce Commission is without power to make.

Respectfully submitted,

HENRY L. STONE,
WM. A. COLSTON,
*Solicitors for Appellants.*

CLAUDE WALLER,
JNO. B. KEEBLE,
WM. A. NORTHCUTT,
*Of Counsel.*

March 17, 1915.

# APPENDIX.

## PART I.

**Extracts from the Debates on the Hepburn Bill which Show that Congress Has Not Changed the Rule as to Review of the Commission's Findings of Fact by the Judicial Power of the Government, and that the Conclusions of the Interstate Commerce Commission are Subject to Judicial Review.**

## PART II.

**Extracts from the Debates on the Hepburn Bill which Show that the Amendment of Section 1 of the Act to Regulate Commerce, Defining the Term "Transportation" was Intended to Prevent Unjust Discrimination which Necessarily Arises from the Ownership and Control of Facilities of Transportation by Shippers and Receivers of Freight.**

## PART I.

### Extracts from the Debates on the Hepburn Bill which Show that Congress Has Not Changed the Rule as to Review of the Commission's Findings of Fact by the Judicial Power of the Government, and that the Conclusions of the Interstate Commerce Commission are Subject to Judicial Review.

The extracts are from Volume 40 of the Congressional Record covering the debates of the first session of the 59th Congress from February 26th to April 7, 1906.

#### Judicial Review of Commission's Orders.

(Page 3538) Senator Scott, March 7, 1906:

> "I realize, however, that there is a demand that the Interstate Commerce Commission should be given authority in the matter, and that power will probably be given it to fix rates when conditions require it. I am opposed to giving them that power, certainly without a provision for a broad and general court revision, to which the shipper and carrier can appeal when the rate designated is unfair to either. I hold to such a revision in the court since the history of the Interstate Commerce Commission has shown to my mind that the power of the court to review their decision has simply saved this country from the experience of European countries."

(Page 3539) Senator Bailey, March 7, 1906:

> "It occurs to me that if it is an inherent right of a court to hear, and pending final determination, to suspend the enforcement of the rates, and if it is a right of the carrier to have the rate suspended, you

concede something to the force of the contention which I have just indicated when you require the carrier to deposit a bond or money in the court until the proper and final disposition of the case."

(Page 3793) Senator Culberson, March 13, 1906:

"But, Mr. President, when interrupted, I was speaking with reference to what ought to go into this bill with respect to the right of judicial review. I have said that, in my opinion, it is unnecessary to incorporate such a provision, but that it would be harmless if incorporated. I desire to say now that if the bill undertakes affirmatively to limit or deny the constitutional right of review, that provision of the bill would be void, although the other part of the act might stand and be effective."

(Page 3987) Senator Dolliver, March 16, 1906:

"I agree with what the Senator says about the difficulty involved in retaining the equity jurisdiction of the Circuit Court of the United States, and I say that no provision has been attempted to limit or abridge the equity powers of the courts solely for the reason that it was the opinion of those who were interested in framing the bill that such a provision would introduce an uncertain constitutional element into the situation."

(Page 3991) Senator Knox, March 16, 1906:

"I stated that there ought to be a court provided. I think that is really the only difference between the Senator from Iowa and myself, barring one or two little details, which have not been referred to. I think he and I could agree on this question of court review. As I understand, the Senator from Iowa (Mr. Dolliver) and the Senator from Minnesota (Mr. Clapp) made a similar statement the other day dur-

ing his speech on the floor of the Senate, and Mr. Hepburn made the same statement on the floor of the House on the day the bill was passed, which is that they recognize the power of the Circuit Court to entertain suits to set aside the orders of the Commission; *that they recognize that that power is an unrestricted power.* Now, I say the only difference between them and myself is—and my views are set out in the fifth section of the bill I offered—that I agree that the court has power, but I am in favor of restricting that power in the interest of the public by requiring a cash deposit or the deposit of a bond so as to prevent frivolous appeals to the court."

(Page 4090) Senator McCreary, March 20, 1906:

"I agree with the senior Senator from Texas (Mr. Culberson), who said in his very able and interesting speech: 'As the grounds of judicial interposition are constitutional, there is in my judgment no necessity for embodying the right of judicial review in this bill. The right of judicial review exists by virtue of the Constitution, and a statute may not add to or subtract from it.' "

(Page 4421) Senator Spooner, March 27, 1906:

"It is the function of the Supreme Court and the inferior courts to secure to the citizens the guaranties of the Constitution of life, liberty and property. It certainly could not have been in the contemplation of the framers that their power to discharge this function should be exercised in given cases not according to the judgment of the court, but according to the legislative will."

(Page 4426):

"Congress may withhold, or might have withheld jurisdiction from the Circuit courts in certain cases. They did it for many years, and we may admit they

may now withhold jurisdiction from the Circuit and District Courts; but, Mr. President, so long as they do not deprive the court of jurisdiction, so long as looking into the statute the court can see that it is given jurisdiction of the subject-matter, Congress can not be permitted on principle—a principle which this people never must suffer to be invaded or abrogated—to dictate to the court the manner in which it shall exercise this judicial power. That would emasculate the courts of justice; that would be to obliterate the line which the Constitution has drawn between the co-ordinate and independent branches of the Government. Under that theory the judicial department of the Government would cease to be an independent department of the Government, and a blow would be struck at the best work of the fathers."

(See Senator Spooner's speech, pages 4421 to 4433.)

(Page 4378) Senator Teller (Col.), March 26, 1906:

"The President of the United States, as has been said today, has sent us two messages. In both he outlined the same thing—a rate-making by the Commission whenever the Commission shall determine that the rate made by the railroad is not proper; a review by the courts; and the President says this rate is to stand until the court shall suspend it or, in other words, declare that the Commission has made a mistake. There is the issue before the country. I do not believe the railroad people are especially controverting this question, except to insist that they shall have their day in court, and nobody, I repeat, wants to pass a law that does not give them their day in court."

(Page 4417) Senator Overman (N. C.), March 27, 1906:

"But I want to say right here, let the courts of the land be open at all times to the rich and poor

alike, to the individual and corporation, and let justice be administered freely, completely and without delay; but the point I make is this, that the amendment suggested will in nowise abridge or limit the right of the railroad, the shipper or any one else. It is only a limitation upon the procedure and practice of the courts when injunctive relief is sought in this particular case. Limit as to the time when, the place where, and the notice to be given is no limitation upon the constitutional or any other right the petitioner or complainant might have."

(Page 4424) Senator Rayner (Maryland), March 27, 1906:

"If you pass a law here and have no court to review the decision, so that you can not execute the fifth amendment, that law would be void. That is an answer to the question. The law itself would be void. For instance, if there is no court now in existence with any right to review the order of the Interstate Commerce Commission under the Hepburn bill, then the very law proposed to be passed here would, under the Minnesota case, be void."

(Page 4485) Senator Knox (Pa.), March 28, 1906:

"I have no hesitation in saying, upon the authority of the cases which have already been submitted to the Senate by the distinguished Senators who have participated in this debate, that a bill drawn upon the theory that the orders of the Commission shall be final and assailable in the courts would be unconstitutional. (Citing and quoting from Covington, etc., Turnpike Co. v. Sandford, 164 U. S. 592; C. M., etc., R'y v. Tompkins, 176 U. S. 172; C., M. & St. P. R'y Co. v. Minnesota, 134 U. S. 458.)

And again at page 4486:

"I desire to draw special attention to the fact that the question that can be submitted to the deter-

mination of the court is solely the question as to whether the order violates the rights of the party who institutes the proceedings. There is no attempt to define what those rights are. There is no attempt to expand or to contract them. It is the heritage of every English-speaking man or association of men to have his rights determined in a court. It is for the court to decide what those rights are. An attempt to specify what right shall be determined by the court might be fatal to the constitutionality of the legislation. If the specification should not include all his rights, he would be shorn of a constitutional privilege. Should it undertake to enumerate rights which he could not establish, it would be meaningless and unintelligent legislation."

On the same page Senator Knox again said:

"Mr. Hepburn, in closing the debate in the House (Record, p. 2651), replying to a question of Mr. Sullivan, of Massachusetts, stated there was no doubt of the power of the court to review the reasonableness of a rate fixed by the Commission. I quote from the Record:

" 'Mr. Sullivan, of Massachusetts: Then, in your opinion, the court, under this bill, if it becomes a law, will have the right to enjoin a rate fixed by the Commission if it is unreasonably low, but yet does not amount to confiscation?

" 'Mr. Hepburn: I think there is no doubt about that.' "

(Page 4867) Senator Stone (Mo.), April 5, 1906:

"It follows, then, that if the Commission should adhere to an order which a carrier might deem to be unjust and unreasonable, the controversy must be settled in the courts. It must be settled in the courts because there could be no other forum for settling it. I can hardly believe that any Senator would deny

jurisdiction to the courts to hear and determine controversies of that character, even though he believed that Congress had power to deny it. If that be true, Mr. President, as I am sure it is, then it is useless to discuss the question as to whether Congress could, by affirmative enactment, place the orders of the Commission above and beyond the reach of the courts. There is no use talking about something nobody wants to do, and which many think can not be done."

## PART II.

### Extracts from the Debates on the Hepburn Bill which Show that the Amendment of Section 1 of the Act to Regulate Commerce, Defining the Term "Transportation" was Intended to Prevent Unjust Discrimination which Necessarily Arises from the Ownership and Control of Facilities of Transportation by Shippers and Receivers of Freight.

On January 31, 1906, Representative Campbell, of Kansas, said (Congressional Record, Vol. 40, Part 2, p. 1828):

> "The irresistible result and the logical effect of conceding to large shippers the right to use their own facilities is the creation of monopoly, which is always dangerous to the public welfare."

And on February 2, 1906, Mr. Goulden said (40 Congressional Record, Part 2, p. 1961):

> "The bill that passed last Congress, and against which I had the honor of casting my vote, was exceedingly objectionable. The provision creating a special court with its heavy expenses, the failure to

reach the private-car and terminal-charge evils, caused the Senate to refuse last year to consider the action of this body. The thousands of private cars of the meat, fruit and other trusts dictated terms to the railroads and compelled compliance with their demands.

"The same is equally true of the terminals. With the indulgence of the members of the House, allow me to give a few of the many cases familiar to the country:

"The Union Pacific Railroad Company, of Pittsburg, Pa., less than 10 miles in length and connecting the great plants of the Steel Trust at Homestead, Braddock and Duquesne, secures an average of one-third of the freight charges on all freight entering or leaving from all points in the United States.

"The Monongahela and Southern Railroad Company, of Pennsylvania, one mile in length, connecting the works of Jones & Laughlin, of the southside, Pittsburg, with the Baltimore & Ohio, the Pennsylvania Lines and the Lake Erie roads, secures one-fourth or more of the freight charges to all points in the country, exacted as tribute from the railroads mentioned."

And Mr. McCall said (p. 1969):

"The private car, refrigerator car, the industrial switch, receiving a part of the through rate as if it were an independent line, every instrument of favoritism and injustice, had justly received public condemnation."

And on February 7, 1906, Representative Wiley, of Alabama, repeated what he had said a year previously (Congressional Record, Vol. 40, Part 3, p. 2241):

"It is an open secret that men like Rockefeller and Carnegie, by means of their side tracks and pri-

vate terminal facilities, have been able to secure such low rates for the carriage of their stupendous volume of freights as not only to undersell all competitors, but to destroy all competition as well.

"There are numerous business concerns in all sections of the country having several miles of private side tracks, switching privileges and terminal facilities. I have not time to enumerate them. These accommodations, by whatever name called, enable the owners to secure special rates, which are but a subterfuge, device or scheme to cover up and hide from the eyes of the public unjust rebates. They obtain a division of freight on all cars delivered to connecting roads by means of their private terminals, and receive compensation for services rendered which is unfair and excessive. These abuses can not be rectified until these terminal companies are placed under the control of the Interstate Commerce Commission."

And said further:

"The bill now under consideration does embrace within its provisions, and seeks to regulate them, the private-car and side-track evils, and in that respect, if in none other, it is a far better measure, more remedial and beneficial than the Esch-Townsend Bill."

On March 13, 1906, Senator Simmons said (Congressional Record, Vol. 40, Part 4, p. 3727):

"It is a well-known fact that within this time certain combinations have monopolized many of the prime commodities of industry and commerce, and, through the enormous volume of business they can give or withhold, aided by the devices of private switches, cars, refrigeration, ventilation and icing, have for some time past compelled, and today in

many instances compel the railroads to accept such compensation as they are willing to pay for the transportation of commodities in which they deal or for the traffic which they control.

"This control of the big shippers includes not only the oil and fresh-meat business of the country, but it extends to the fruit business, the dairy business, the truck business and the brewing business, as well as to other important lines of business."

# In the Supreme Court of the United States.

OCTOBER TERM, 1914.

LOUISVILLE & NASHVILLE RAILROAD COMPANY AND NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY, APPELLANTS,
*v.*
THE UNITED STATES, INTERSTATE COMMERCE COMMISSION, CITY OF NASHVILLE, ET AL.
No. 673.

*APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF TENNESSEE.*

## BRIEF FOR THE UNITED STATES.

### STATEMENT OF THE CASE.

This is an appeal from a decree of the District Court of the United States for the Middle District of Tennessee denying an interlocutory injunction. The order of the Interstate Commerce Commission which is under attack related (1) to coal rates to Nashville, Tennessee, and (2) to switching practices thereat. The District Court refused an injunction to either branch of the order, and

83006—15

it is submitted that its action in so doing was based upon familiar principles no longer open to debate.

The carefully reasoned opinion of the District Court (R. 83; 216 Fed. 672) and the no less carefully prepared report filed by the Commission in support of its order (R. 60) present the case with such fulness as to render prolonged discussion unnecessary.

## ARGUMENT.

### I.

**The granting or refusing of an interlocutory injunction is a matter in the sound discretion of the court, and is not to be reviewed unless this discretion has been abused. No such abuse here appears.**

The Commerce Court Act of June 18, 1910, 36 Stat. 539, 542, c. 309, sec. 2 (Judicial Code, sec. 210), limited the right of appeal from interlocutory orders to those granting or continuing an injunction restraining the enforcement of an order of the Interstate Commerce Commission. The District Court Jurisdiction Act (Urgent Deficiency Appropriation Act of October 22, 1913, 38 Stat. 208, 220) extended the right of appeal to orders "granting or denying, after notice and hearing, an interlocutory injunction."

This enlargement of the right of appeal, however, in no way changed the fundamental rule that the granting, denying, or dissolution of an inter-

locutory injunction rests in the sound judicial discretion of the court of original jurisdiction; and where that court has not departed from the rules and practices of equity, established for its guidance, its orders in this regard may not be reversed by the appellate court without clear proof that its discretion has been abused. The question is not whether or not the appellate court would have made, or would make, the order. *Huffington* v. *Harvey*, 95 U. S. 99, 100; *Thompson* v. *Nelson* (C. C. A. 6th Cir.), 71 Fed. 339; *Vogel* v. *Warsing* (C. C. A. 9th Cir.), 146 Fed. 949; *American Grain Separator Co.* v. *Twin City Separator Co.* (C. C. A. 8th Cir.), 202 Fed. 202; *Samson Cordage Works* v. *Puritan Cordage Mills* (C. C. A. 6th Cir.), 211 Fed. 603.

The case was made in the court below by the petition of appellants, the answers of the United States and the Interstate Commerce Commission thereto (in which were traversed all the substantive grounds for relief asserted in the petition), and sundry exhibits, to wit, the complaint filed before the Commission by the Traffic Bureau of Nashville, the separate answers thereto of the Louisville & Nashville Railroad Company and the Nashville, Chattanooga and St. Louis Railway, the report of the Commission, and the order complained of—the latter accompanied, of course, by all those presumptions of regularity with which the law surrounds it. There were also filed on

behalf of the petitioners the affidavits of Geo. W. Lamb and C. B. Compton.

The record of the hearings before the Commission containing the evidence upon which it acted, and by which alone the soundness of its conclusions of fact could be tested, was not adduced because of its "great size and volume." Indeed, not even that portion of it which contained the evidence of the witness Geo. W. Lamb was exhibited, but instead the rather extraordinary course was adopted of filing the affidavit of Lamb himself as to the substance of his previous testimony, or as to that portion of it (inconclusive here) having reference, not to the cost of transporting coal to Nashville, but to the cost of "earning a dollar of revenue."

It was sought to further buttress the petition by the affidavit of C. B. Compton, setting forth the fact, fairly obvious from a mathematical standpoint, that if the lower rate imposed by the Commission should be permitted to supplant the higher rate fixed by the carriers the amount to be collected by the carriers from the shippers would be correspondingly reduced. But there is no pretense, either in this affidavit or elsewhere, that the rate fixed by the Commission was so low as to be confiscatory.

It further appeared that notwithstanding the allegation of irreparable injury, and the consequent inducement to haste, the application for the

interlocutory injunction was deferred, with what seems studied care, until the very moment for compliance with the order had arrived.

On such a record, how can it be said that the withholding of an interlocutory order was an improvident exercise of judicial discretion?

## II.

**The order of the Commission declaring the coal rate unreasonable involves a question of fact, and is neither without substantial evidence to support it, nor contrary to the indisputable character of the evidence.**

That the reasonableness of a rate is a question of fact, and that the finding of the Commission thereon is conclusive unless it be without substantial evidence to support it or contrary to the indisputable character of the evidence, is firmly settled. In the language of this court itself, the doctrine has been announced with "tiresome repetition." *Illinois Central R. R. Co.* v. *Int. Com. Comm.*, 206 U. S. 441, 455; *Int. Com. Comm.* v. *Chicago & Alton R. R. Co.*, 215 U. S. 479; *Int. Com. Comm.* v. *Illinois Central R. R. Co.*, 215 U. S. 452; *Int. Com. Comm.* v. *C. R. I. & P. Ry. Co.*, 218 U. S. 88, 110; *Int. Com. Comm.* v. *Delaware, Lackawanna & Western R. R. Co.*, 220 U. S. 235; *Int. Com. Comm.* v. *Louisville & Nashville R. R. Co.*, 227 U. S. 88; *Los Angeles Switching Case*, 234 U. S. 294; *United States* v. *Louisville & Nashville R. R. Co.*, 235 U. S. 314.

The petition filed in the District Court sets up the following grounds of attack upon the order in question (R. 9):

> (*a*) The findings and orders made by the Commission were wholly without substantial evidence to support them.
>
> (*b*) The findings and orders made by the Commission were contrary to the indisputable character of the evidence.
>
> (*c*) The facts found by the Commission do not as a matter of law support the orders made by it.
>
> (*d*) The Commission was without jurisdiction to make the orders.
>
> (*e*) The enforcement of the orders made by the Commission will result in the taking of petitioners' property without due process of law, and will result in the taking of petitioners' property without just compensation, in violation of the Fifth Amendment of the Constitution of the United States.

Of these contentions the first two are expressly abandoned, both in the court below and in this court. As stated at page 25 of appellants' brief—

> But appellants' contentions upon the motion for the interlocutory injunction were not based upon the allegation that the findings and orders of the Commission were wholly without substantial evidence to support them, or that the findings and orders made by the Commission were contrary to the indisputable character of the evidence, and, therefore, it was not, as it appeared to appellants, at all necessary in the determi-

> nation of the motion for an interlocutory injunction that the transcript of the large record before the Commission be filed with or considered by the court.

This concession is fatal to appellants' case. Appellants seek, however, to modify its harmful effect by falling back upon what is in effect a mere criticism of the Commission's report, and by insisting, not that the findings and orders of the Commission are without support in the record of the cause, but that they are not adequately supported by those facts set forth in the Commission's report.

Appellants accordingly are pleased to confine themselves to a discussion of the report, by paragraphs, referring to the latter as "the Commission's first finding of fact," "the Commission's second finding of fact," etc. These paragraphs will be found upon analysis to present the following propositions, giving to them the numbers so assigned by appellants:

*First.* That the present coal rate to Nashville has been in force since 1888, a period of 25 years; and this, notwithstanding the fact that a comparison of the transportation and operating conditions during that period demonstrates that there has been a great improvement from the carrier's standpoint.

*Second.* That a comparison of the coal rate to Nashville with that to Memphis, after giving due

consideration to all legitimate factors of difference between them, demonstrates that the Nashville rate is unreasonably higher than the Memphis rate.

*Third.* That a comparison of the coal rate to Nashville with that to Louisville, after giving due consideration to all legitimate factors of difference between them, demonstrates that the Nashville rate is unreasonably higher than the Louisville rate.

*Fourth.* That a comparison of the revenue per car-mile on this coal traffic with the average revenue per car-mile on other classes of traffic on appellants' lines, and also on the Illinois Central and Tennessee Central roads, demonstrates that the average car-mile revenue on this traffic largely exceeds the average car-mile earnings on other classes of freight.

Taking up the propositions seriatim, it is argued as to each one that it is insufficient to support the finding that the rate was unreasonable, and therefore the order of the Commission should be enjoined. To this there are two obvious answers:

The first is that it is the cumulative effect of these facts, and not their isolated strength, upon which the order of the Commission must rest. All of them clearly point in one direction, to wit, the unreasonable character of this rate.

A similar line of argument was attempted by these same appellants in *Interstate Commerce*

*Commission* v. *Louisville & Nashville R. R. Co.*, 227 U. S. 88, in which case this court said (p. 98):

> It is unnecessary in this case to review each of the matters discussed, ruled and found by the Commission in its Report and only the more salient facts will be mentioned. *For the validity of the order does not necessarily depend upon the correctness of each of these findings, so that the breaking of one or many links by disproof would destroy the chain upon which the order depended.* These findings are collateral and if correct might be confirmatory of the ruling, which, however, might still be sustained if some of these statements were eliminated. The question is whether there was substantial evidence to support the order.
>
> The pleadings charged that the new rates were unjust in themselves and by comparison with others. This was denied by the carrier. The Commission considered evidence and made findings relating to rates which the carrier insists had been compelled by competition, and were not a proper standard by which to measure those here involved. *The value of such evidence necessarily varies according to circumstances, but the weight to be given it is peculiarly for the body experienced in such matters and familiar with the complexities, intricacies and history of rate-making in each section of the country.* So, too, the fact that a Commodity rate is low may cast

> some light on the reasonableness of the higher rate on the Class, from which that commodity was taken or to which it might be legally restored.

In the second place, it not only does not appear that these so-called findings of fact exhausted the evidence before the Commission, but it affirmatively appears that there was a large mass of evidence before the Commission and considered by it which the petitioners did not see fit to present to the court, advancing "the great size and volume of said record as being justification for not filing same at this time." The court is now asked to presume that there is nothing in this voluminous record which will support the Commission's order. As the court below well says (R. 90):

> It necessarily follows that where the party complaining of an order made by the Commission does not exhibit to the Court the evidence taken before the Commission, but in lieu thereof insists that the evidential facts found by the Commission are insufficient to support its conclusion as to the reasonableness or unreasonableness of a given rate, such conclusion of the Commission should be accepted by the Court as final and not reviewable upon the evidential weight of such facts, unless it appears, not only that the Commission undertook to embody in such findings all the material facts established by the evidence, but, in addition, either that the evidential facts so found furnish no substantial support to

such conclusion, or that such conclusion is contrary to the indisputable character of such evidential facts, in which cases the conclusions would involve an error of law reviewable by the Court.

## III.

**The order of the Commission as to discriminatory switching practices likewise involves a question of fact, as to which the finding of the Commission is neither without substantial evidence to support it nor contrary to the indisputable character of the evidence. Nor does it violate any constitutional or statutory right of appellants.**

Undue discrimination is a question of fact within the peculiar province of the Commission. *Int. Com. Comm.* v. *Alabama Midland Ry. Co.,* 168 U. S. 144, 170; *Pennsylvania R. R. Co.* v. *International Coal Mining Co.,* 230 U. S. 184, 196; *Mitchell Coal Co.* v. *Pennsylvania R. R. Co.,* 230 U. S. 247; *United States* v. *Louisville & Nashville R. R. Co.,* 235 U. S. 314; *Pennsylvania Company* v. *United States,* No. 591, October Term, 1914, decided February 23, 1915.

As to that portion of this order with reference to switching practices, we submit the case last cited (*Pennsylvania Company* v. *United States*) as decisive of the case at bar. In that case the Pennsylvania Company refused to switch at Newcastle any cars arriving over the Buffalo, Rochester & Pittsburgh line, although it performed a like service for other railroads at fixed rates. In

the case at bar the discrimination is not directed to all cars over the lines of the Tennessee Central, nor to all classes of freight, but only to shipments of coal. Cars containing other freight are switched at a flat charge of $3 per car; and even as to coal, one of the appellants, the Nashville, Chattanooga & St. Louis Railway, at one time had in force a switching rate of 60 cents per ton, which rate, however, was promptly cancelled when the testimony before the Commission in this case disclosed its existence.

It is clear, therefore, that the discrimination in this case differs from the discrimination in the Newcastle Switching Case only in degree, and not in kind, and the order of the Commission directing its discontinuance is fully within the Commission's powers.

### CONCLUSION.

The decree of the court below should be affirmed.

JOHN W. DAVIS,
*Solicitor General.*

FEBRUARY, 1915.

○

# INDEX.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1914.

**Louisville & Nashville Railroad Company, et al.**

VS.

**United States of America, et al.**

No. 673.

## STATEMENT OF THE CASE.

Inasmuch as the origin, facts and history of the case have been fully stated in the briefs of the Government and of the Interstate Commerce Commission, it will be unnecessary for the intervenors, the Traffic Bureau of Nashville, the City of Nashville and Davidson County to make further reference thereto.

## BRIEF AND ARGUMENT.

This Court has held that the Interstate Commerce Commission has jurisdiction over questions of fact to revise the rates, rules, regula-

tions and practices under Sections 1, 3 and 15 of the Act to Regulate Commerce, approved February 4, 1887, and Acts supplementary and amendatory thereof. *United States* v. *L. & N. R. R. Co.*, 235 U. S., 314, 320.

The Commission made its finding and issued its orders finding that the rates of one dollar per ton on coal on the L. & N Railroad, and on the N., C. & St. L. Railway were unreasonable and that a rate of eighty cents on the L. & N. Railroad and ninety cents on the N., C. & St. L. Railway were as reasonable rates, and that the switching practice was discriminatory and must be stopped.

There was no evidence brought forward by the appellants in this case from the trial before the Interstate Commerce Commission. Their contention is that the findings, as stated by the Commission were insufficient to deduce the conclusion that the old rates were unreasonable and the prescribed rates were reasonable.

The appellants do not contend that the Interstate Commerce Commission's report contains all of the facts. There is no statement in their finding or order upon which to predicate such an argument. The rule, as we understand, of this Court is that the orders of the Interstate Commerce Commission are surrounded with

every presumption that the finding and the order is legal and correct until it is specifically pointed out by the appellants from the record wherein it is illegal, oppressive, confiscatory and without facts to support it. The appellants declined to adduce any of the evidence introduced before the Interstate Commerce Commission and withdraw from the consideration of the Court all criticism of the primary facts with the statement that the evidence was too voluminous to bring forward. The appellants cannot be allowed to criticise the findings of the Interstate Commerce Commission without also bringing forward the entire record upon which the finding was based.

The Interstate Commerce Commission was created and given the power to pass upon facts and determine rates. It has been said that by reason of their familiarity with rates and the switching practices of railroads, that the Courts will presume, unless there are cogent facts of record to the contrary, that the orders of the Commission are reasonable and warranted.

As a case in point we cite the following:

The Supreme Court, speaking through Mr. Justice Lamar, said:

> "The reasonableness of rates cannot be proved by categorical answers, like those

given, where a witness may, in terms, testify that the goods were worth so much per pound, or the services worth so much a day. Too many elements are involved in fixing a rate on a particular article, over a particular road, to warrant reliance on such method of proof. The matter has to be determined by a consideration of many facts.

In this case the Commission had before it many witnesses and volumes of reports, statistics and estimates, including the rates on lumber charged by other roads, and those charged by these carriers on other classes of freight. . . .

With that sort of evidence before them, rate experts of acknowledged ability and fairness, and each acting independently of the other, may not have reached identically the same conclusion. We do not know whether the results would have been approximately the same. For there is no possibility of solving the question as though it were a mathematical problem to which there could only be one correct answer. Still there was in this mass of facts that out of which experts could have named a rate. The law makes the Commission's finding on such facts conclusive."

*Interstate Commerce Commission* v. *U. P. R. Co. et al.;*

*I. C. C.* v. *N. P. Ry. Co. et al.;*

*I. C. C.* v. *Great N. Ry. et al.,* 222 U. S., 549, 56 L. Ed.

The report of the Commission, which is a part of the record before this Honorable Court, shows that it considered before it made its findings the following evidence:

> "Innumerable exhibits comparing on ton, car and train mile basis the Nashville rate with the rates on coal obtaining north of the Ohio River; with rates to St. Louis, East St. Louis, Louisville, Cincinnati, Memphis, and other points on the Ohio and Mississippi Rivers from mines in Kentucky, Tennessee and Virginia; with rates on coal prescribed by this Commission in a number of cases; with rates on coal to Chattanooga and to certain destinations in the southeast; with rates on coal from other mines to Nashville; with rates on other commodities to Nashville and to other destinations; with the average per ton and per car-mile rate received by defendants and other carriers on all traffic. Rec., p. 62."

The appellants state on page 5 of the transcript of record as their reason for not bringing forward all of the evidence which was before the Commission "the great size and volume of said record."

The following records in other cases were introduced before the Commission as evidence in the instant case, to-wit:

"*Black Mountain Coal & La*[d Company] *et al. v. Southern Railway Co*[mpany et al.,] I. C. C. Dockett, 1381, heard at [Washington,] D. C., April 22 and 23, 1908.

*Andy's Ridge Coal Co. et al.* [v. *Southern Railway Company et al.*,] I. C. C [Docket No.] 2836, heard at Knoxville, Tenn., [January 24,] 25 and 26, 1910.

*Alabama Coal Operators' A*[*ssociation* v. *Southern Railway and Louisv*[*lle & Nash-ville Railroad Company*,] I. C. C [Docket No.] 3153, heard at Birmingham, Al[a., December] 16 and 17, 1910.

Investigation and Suspen[sion Docket] No. 71.

In the matter of the investiga[tion and sus-pension of advances in rates by] carriers for the transportation of coal and [coke in car-loads from points on the Louisv[ille & Nash-ville Railroad to points on the Cleveland, Cincinnati, Chicago & St. Lou[is Railway] and other destinations. (26 I. C. C. Rep., 20-33.)

*Memphis Freight Bureau* v. *Louisville & Nashville Railroad Company et al.*, I. C. C. Docket No. 2998, 26 I. C. C. Rep., 402-406.

And by like stipulation it was agreed that any record in the office of the Commission might be considered in this case."

A further prolongation of this argument is unnecessary either by reference to the facts con-

tained in the record or the references in the record and the evidence which was not brought forward, or by further citation of authority.

The practice of refusing reciprocal switching relations between the several railroads entering the terminals for city service has been declared by Congress to be contrary to the public welfare and it has been reprobated by the Commission which has jurisdiction over the subject. This Court has had the question before it in many cases and phases. The vice inherent in the practices heretofore obtaining here at Nashville, was fully discussed and inquired into before this Court in the *New Castle* case. The same question was largely at the bottom of the case of the *United States* v. *Terminal Railroad Association*, 224 U. S., 383, and also the *St. Louis Terminal* case, recently decided before this Court. We are aware that the St. Louis cases came up under the anti-trust provisions, however the underlying question was the same.

The ultimate purpose of the provisions of Section 3 of the Act to Regulate Commerce applicable to the terminal situation, is that Congress intended to prevent a monopoly arising or being created which was made possible on account of the geography and topography of any municipal situation by which a railroad or railroads

could capture the strategic points of ingress and egress to a community and sit guarded over the gates of its commerce. This Act designs to make such an odious situation impossible whether it be exercised through the device of a terminal company or by the lines of one or more carriers and whether that be accomplished by the organization of a company whose ultimate purpose is to construct and then lease its entire properties to other companies for operation. The partnership arrangement between the two appellants cannot avail in the evasion of the statute. The Commission found the terminals open. The appellants were operating the terminals on a charge actual cost as between themselves and on a basis of a traffic of $3.00 per car for all non-competitive freight except coal.

We think that we are justified in stating that under this statement that the Commission was within the jurisdiction of the statute and was thoroughly justified in issuing its order to restrain the further operation of the discriminatory switching practices at Nashville.

The complaint of appellants that the order of the Commission prohibiting the existing switching practice was confiscatory cannot be true because the order does not fix or attempt to name the rate at which coal shall be switched from the

Tennessee Central tracks. The only requirement is that all coal shall be switched without discrimination and the publication of the tariff is left to the operating road. (R., 73 and 74.)

## CONCLUSION.

In conclusion we think that the order of the Interstate Commerce Commission should be sustained.

Respectfully submitted,

A. G. EWING, JR.,
T. J. MCMORROUGH,
*Counsel.*

Nashville, Tennessee.

No. 673.

# In the Supreme Court of the United States.

OCTOBER TERM, 1914.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, AND NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY, APPELLANTS,

*v.*

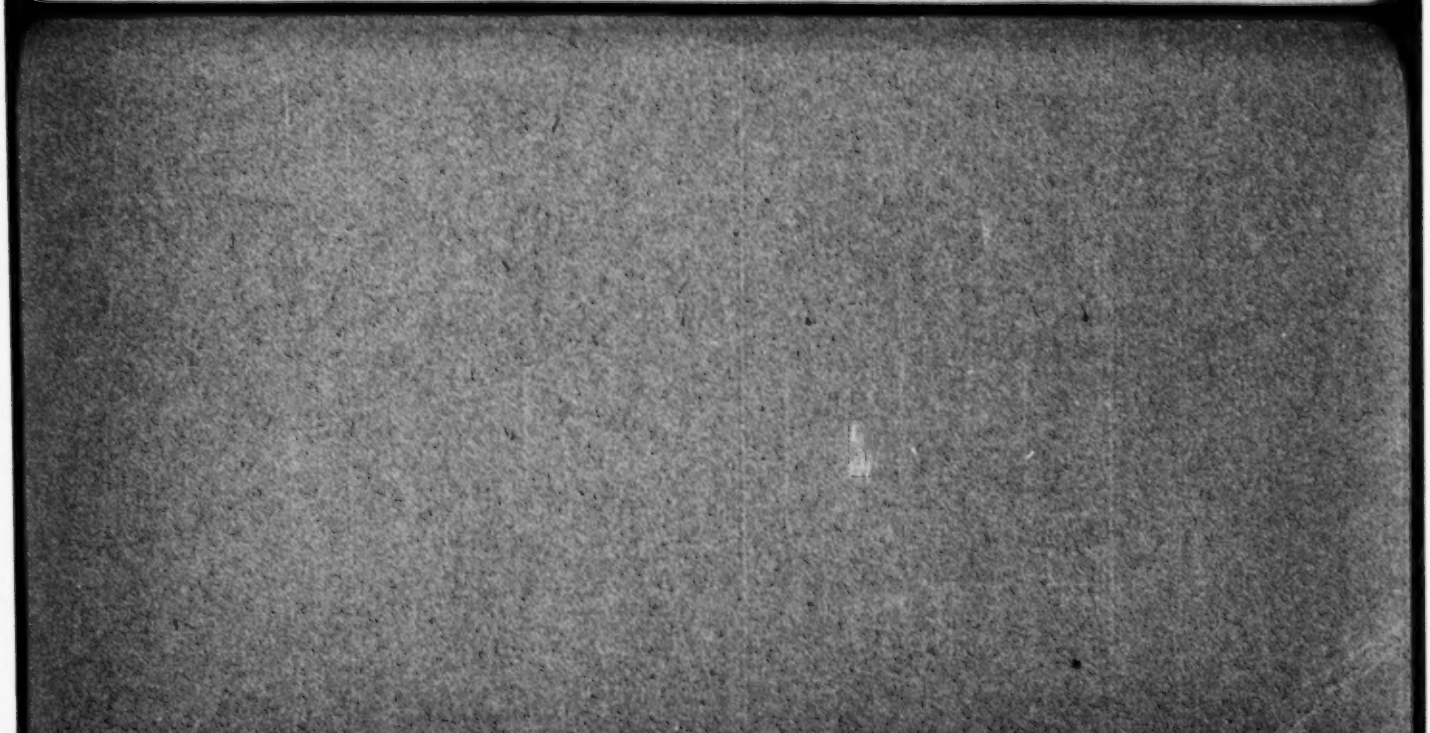
THE UNITED STATES, INTERSTATE COMMERCE COMMISSION, CITY OF NASHVILLE, ET AL., APPELLEES.

*APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF TENNESSEE.*

## BRIEF ON BEHALF OF THE INTERSTATE COMMERCE COMMISSION.

JOSEPH W. FOLK,
CHARLES W. HENDRICK,
*Counsel for Interstate Commerce Commission.*

WASHINGTON : GOVERNMENT PRINTING OFFICE, 1915



# INDEX.





80287—15——1

## CASES CITED.

# In the Supreme Court of the United States.

OCTOBER TERM, 1914.

---

LOUISVILLE & NASHVILLE RAILROAD COMPANY and Nashville, Chattanooga & St. Louis Railway, appellants,
*v.*
THE UNITED STATES, INTERSTATE COMMERCE COMMISSION, City of Nashville, et al., appellees.

No. 673.

---

*APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF TENNESSEE.*

---

## BRIEF ON BEHALF OF THE INTERTATE COMMERCE COMMISSION.

---

### STATEMENT OF THE CASE.

This is an appeal from an order of the United States District Court for the Midle District of Tennessee, denying a motion of apellants for an interlocutory injunction against th enforcement of an order of the Interstate Commece Commission.

The petition filed in the District Court by the appellants prayed for a preliminary and permanent injunction restraining the enforcement of two orders of the Interstate Commerce Commission entered December 9, 1913. In the proceedings before the commission, in which the orders were issued, the Traffic Bureau of Nashville, Tenn., was complainant and the appellants and other railroads were defendants. The report (28 I. C. C., 533) and order of the commission in that proceeding are found in the printed record beginning at page 60. The orders (Rec., pp. 72, 73, and 74) are contained in one issue, but have reference to two distinct controversies.

The first order relates to and makes a reduction in the rates on coal of the Louisville & Nashville Railroad from mines on its Owensboro and Henderson divisions in western Kentucky to Nashville, Tenn.; and rates on coal on the Nashville, Chattanooga & St. Louis Railway from mines on its road in Alabama, and in Tennessee the movement of which is through Alabama, to Nashville. The rate on the Louisville & Nashville Railroad was reduced from $1 to 80 cents per ton, and the rate on the Nashville, Chattanooga & St. Louis Railway was reduced from $1 to 90 cents per ton. This order is made under sections 1 and 15 of the act to regulate commerce.

The second order is in reference to interswitching of coal at Nashville. It requires the appellants to cease and desist, and for a period of

not less than two years to abstain " from maintaining any different practice with respect to switching interstate carload shipments of coal from and to the tracks of the Tennessee Central Railroad Company at Nashville, Tenn., than they contemporaneously maintain with respect to similar shipments of coal from and to their respective tracks." This order applies in express terms to " each and every defendant " and requires that " interswitching of interstate carload shipments of coal at Nashville " shall be performed by all defendants without discrimination for each other. This order is under section 3 of the act. The Illinois Central and Tennessee Central have not objected to the order.

In each of these orders the appellants are required to file and publish schedules showing the rates prescribed by the commission, and to adopt, with the other defendants, a switching practice that shall conform to the requirement of the second order.

The report of the commission is expressly made a part of each order and contains the conclusions of the commission: (1) That existing rates on coal were unreasonable, fixing in each case reasonable maxima; and (2) that the switching practice at Nashville was " unreasonable and unjustly discriminatory " in that the appellants unjustly discriminated against shipments of coal from the Tennessee Central and unduly preferred shipments of coal from the lines each of the other.

The appellants filed the following exhibits with their petition: "A," a copy of the complaint filed by the Traffic Bureau of Nashville with the Interstate Commerce Commission; "B," the answer filed by the Louisville & Nashville Railroad Company to said complaint; and "C," the answer of the Nashville, Chattanooga & St. Louis Railway Company to said complaint. Exhibit "A" sets forth certain tariffs on coal and mileages by way of showing that the rates complained of are unreasonable, which comparable rates are not denied by the answers filed by the appellants. There was also filed with the petition as an exhibit "E" the report and orders of the commission. Exhibit "E" seems to have been omitted from the record filed in this court, but will be found as exhibit "A" to the answer of the Interstate Commerce Commission.

The appellants sum up their charges against the orders in paragraph (8) of their petition (Rec., p. 9) as follows:

> (8) Your petitioners further say that the Interstate Commerce Commission, in making said report and orders, acted in a capricious and unreasonable manner, exceeding the authority delegated to it by Congress, and erred as a matter of law in the following particulars:
>
> (*a*) The findings and orders made by the commission were wholly without substantial evidence to support them.

(*b*) The findings and orders made by the commission were contrary to the indisputable character of the evidence.

(*c*) The facts found by the commission do not as a matter of law support the orders made by it.

(*d*) The commission was without jurisdiction to make the orders.

(*e*) The enforcement of the orders made by the commission will result in the taking of petitioners' property without due process of law and will result in the taking of petitioners' property without just compensation, in violation of the fifth amendment of the Constitution of the United States.

Three of these objections are expressly predicated upon, and can only be determined by an inspection of, the record of the evidence before the commission. In reference to this record, the petition says (Rec., p. 5):

> And petitioners offer to produce and file as a part hereof, marked "Exhibit D," a transcript of the record of said hearings when and if required so to do, the great size and volume of said record being justification for not filing the same at this time. Petitioners say that said transcript embraces all the evidence which was introduced before the Interstate Commerce Commission in said proceedings and hearings.

This transcript was not produced before the judges upon the motion for the interlocutory injunction and consequently is not included in the

record before this court. Material portions of the evidence before the commission, however, will be considered in connection with the argument herein.

The appellants filed with their motion the affidavit of George W. Lamb, second assistant comptroller of the Louisville & Nashville Railroad Company, with a printed statement attached thereto, which affidavit and statement are found on pages 78 to 81 of the record. Appellants also filed an affidavit by C. B. Compton, freight traffic manager of the Louisville & Nashville Railroad Company, which appears upon pages 81 and 82 of the record.

The Interstate Commerce Commission filed its sworn answer, with a copy of its report and orders aforesaid, which were considered by the judges in the hearing of the motion for an injunction.

The foregoing constitutes the record upon which Judges Warrington, McCall, and Sanford, sitting as the District Court, were asked to issue an interlocutory injunction.

The order of the commission was entered on December 9, 1913, to become effective February 15, 1914, upon five days' notice. This necessitated the filing of the tariffs on or before February 10, 1914. The petition of the appellants for an injunction was not filed until the 5th day of February, 1914 (Rec., p. 2), and prayed for "a preliminary injunction" and a final decree restraining and annulling the orders. The statute provides that a five days' notice shall be given to the United States and the

Interstate Commerce Commission of any application for an interlocutory injunction.

The court was convened to meet on the earliest day compatible with the requirements of the statute, namely, February 10, 1914. It will be observed, therefore, that the motion for the injunction was made at Nashville, Tenn., on the last day on which the appellants could file their tariffs in Washington and comply with the orders.

Upon the convening of the court at 10 o'clock a. m., the appellants asked for a 60-day restraining order under the provisions of the statute, without amending the prayer of their petition. This motion for a restraining order was heard and determined by the judges, upon the request of the appellants' counsel, in time to allow the counsel to telegraph to their agent in Washington to file the tariffs already prepared to comply with the orders if the restraining order were not granted. Arguments were heard and after the recess the judges denied the motion for a restraining order. (Rec., p. 100.) Upon request of counsel for appellants, the arguments were then made before the judges upon the prayer in the petition for a preliminary injunction, and the matter was taken under advisement. In the meantime the tariffs were filed. On September 1, 1914, the judges denied the motion for an interlocutory injunction by an order which was duly entered on September 8. (Rec., p. 101.) In connection with the order, the judges also filed a unanimous opinion, which appears on pages 83 to 97 of the record.

From this interlocutory order the appellants have appealed to this court.

### QUESTIONS INVOLVED.

There are twenty-two assignments of error, presenting in their final analysis the following issues:

I. Did the Commission have jurisdiction over the subject matter in controversy?

II. Was there substantial evidence to support the orders?

III. Upon its findings of fact did the Commission have power to order the appellants, and other defendants before it, to cease and desist from unjust discrimination in the practice of switching at Nashville?

IV. Do the orders take petitioner's property without due compensation, in violation of any of the provisions of the fifth amendment to the Constitution of the United States?

V. Was the refusal of the District Court to grant appellants' motion for an interlocutory injunction arbitrary or based upon an error of law?

### ARGUMENT.

**I. All the matters in controversy were cognizable by the Commission.**

A. *Powers of the commission.*—Section 15 of the act to regulate commerce provides:

> That whenever * * * the Commission shall be of opinion that any individual or joint rates or charges whatsoever demanded, charged, or collected by any common car-

> rier or carriers subject to the provisions of this act * * * or that any * * * practices whatsoever of such carrier or carriers * * * are unjust or unreasonable or unjustly discriminatory, or unduly preferential or prejudicial or otherwise in violation of any of the provisions of this act, the commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate or rates, charge or charges, to be thereafter observed in such case as the maximum to be charged, and what * * * practice is just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the commission finds the same to exist, and shall not thereafter publish, demand, or collect any rate or charge for such transportation * * * in excess of the maximum rate or charge so prescribed, and shall adopt * * * and observe the regulation or practice so prescribed.

B. *Character of Orders.*—The report of the commission is divided into two separate and distinct parts. The first part deals with rates for the transportation of coal from mines on the Owensboro and Henderson divisions of the Louisville & Nashville Railroad Co. and the transportation of coal by the Nashville, Chattanooga & St. Louis Railway from mines on its road in Alabama and Tennessee, the movement of which is through

Alabama. The second portion of the report deals with the practice in respect to interswitching of interstate carload shipments of coal at Nashville, Tenn. There are two orders in one issue.

C. *Orders issued after full hearing.*—The petition does not claim that the petitioners were not accorded a full hearing by the commission; nor does it assert that there was any failure on the part of the commission to observe the procedure prescribed by the statute.

D. *Subject matters of Orders within Commission's jurisdiction.*—While the petition states in a general phrase that the Commission was without jurisdiction, it points out no facts to support this statement. Section 15, above quoted, settles the question beyond any controversy that rates and practices of carriers subject to the act are expressly within the jurisdiction of the Commission, and power to determine their reasonableness and to prescribe reasonable rates and practices for the future is expressly conferred upon the commission by the act. The authorities cited also declare that the Commission has these powers.

**II. There was substantial evidence before the Commission to support the orders in question.**

A. *Sufficiency of evidence, generally.*—In *Int. Com. Comn.* v. *Union Pacific R. Co.*, 222 U. S., 541, this court said:

> The reasonableness of rates cannot be proved by categorical answers, like those

given, where a witness may, in terms, testify that the goods were worth so much per pound, or the services worth so much a day. Too many elements are involved in fixing a rate on a particular article over a particular road, to warrant reliance on such method of proof. The matter has to be determined by a consideration of many facts.

In this case the Commission had before it many witnesses and volumes of reports, statistics, and estimates, including the rates on lumber charged by other roads, and those charged by these carriers on other classes of freight. * * *

With that sort of evidence before them, rate experts of acknowledged ability and fairness, and each acting independently of the other may not have reached identically the same conclusion. We do not know whether the results would have been approximately the same, for there is no possibility of solving the question as though it were a mathematical problem to which there could only be one correct answer. Still there was in the mass of facts that out of which experts could have named a rate. The law makes the commission's finding on such facts conclusive (pp. 549, 550).

In *Int. Com. Comm.* v. *Louisville & Nashville R. Co.*, 227 U. S., 88, in answering the question whether there was substantial evidence to support the order,

this court reviews the history of the rate, the movement of the traffic, and said:

> Its tariffs and those of other railroads were offered as a basis for comparing the rates under attack with those charged by this and other companies for similar and longer distances (p. 96).

B. *Sufficiency of evidence as to reasonableness of rates involved.*—The first division of the report and order deals with the question of the rates upon coal into Nashville from the western Kentucky and eastern Tennessee and Alabama mines. The average distance being about 108.5 miles from the former and 140 miles from the latter mines. The rate was $1 per ton. This rate the Commission found to be unreasonable and prescribed 80 cents as a reasonable rate over the Louisville & Nashville from the western Kentucky mines, and 90 cents over the Nashville, Chattanooga & St. Louis Railway from the Tennessee and Alabama mines, where the movement is through Alabama. In arriving at the decision that the rate was unreasonable and that the rates prescribed were reasonable the Commission's report shows that it considered the following evidence:

> Innumerable exhibits comparing on ton, car, and train mile basis the Nashville rate with the rates on coal obtaining north of the Ohio River; with rates to St. Louis, East St. Louis, Louisville, Cincinnati, Memphis, and other points on the Ohio and Missis-

> sippi Rivers from mines in Kentucky, Tennessee, and Virginia; with rates on coal prescribed by this commission in a number of cases; with rates on coal to Chattanooga and to certain destinations in the southeast; with rates on coal from other mines to Nashville; with rates on other commodities to Nashville and to other destinations; with the average per ton and per car-mile rate received by defendants and other carriers on all traffic. Rec., p. 62.)

The petition states that the record is voluminous and filled with statistics. These facts and statistics are of the same kind considered by this court in the *Union Pacific* and *Louisville & Nashville cases, supra,* and were declared to constitute substantial evidence " upon which an expert body may arrive at conclusions " regarding the unreasonableness of a rate and what would be a reasonable rate. It is sufficient for this inquiry that this evidence was before the commission and was discussed by counsel for the petitioners in a full hearing. The report conclusively shows that the commission considered such evidence; discussed it and concluded that the rates charged by appellants were unreasonable and that the rates fixed in the order were reasonable for the services rendered. These statements in the report show that the order was supported by substantial evidence; and the report is the only evidence of this fact in the record.

C. *Orders based upon probative evidence.*—The orders in question were based upon consideration by the commission of the various elements of reasonableness with respect to rates, including ton-mile statistics, per-car earnings and distances involved, train-mile earnings, empty-car hauls, and competition of near-by mines, and upon the recognition by the commission that statistics must be nearly analogous. The report of the commission shows conclusively not only that these facts were before it of record, but that they were accorded due consideration.

The history of the rate in controversy is set forth. This shows what the companies had voluntarily done to meet the situation, both as an inducement to move the traffic and to meet competition at different points. No carrier continues to carry freight at less than a profit for a very long time. Short, sharp, and destructive competition is of brief duration. The rates established and maintained for a period of years by a carrier constitute substantial evidence, which aids in drawing conclusions as to the reasonableness of a rate. (*Louisville & Nashville Ry.* v. *Finn*—decided January, 1915.)

Again, the rate from the Kentucky field to Memphis over the Louisville & Nashville is a very important fact. It had recently been investigated and found to be reasonable. It bears upon the question of the cost of transporting coal over this

line and, when properly consider by experts, is persuasive evidence. The Memp rate had been the subject of sharp controversy fore the commission in a former case. The re d in that case was made a part of the record i his case. The judges were furnished with a cop of that report, dated December 3, 1912. (*Mem Freight Bureau* v. *L. & N. R. R. Co. et al.*, I. C. C., 402.) The fact that there is competiti at Memphis, both water and rail, does not ma it any less a fact to be considered in its prop bearing. The competition was considered in con ction with the rate. The facts show, in both ca beyond controversy, that the water competiti only brought the rate down to $1.40 per ton. e competition with the Illinois Central from the me fields, but with a longer haul, did not affe the rate for several years. When the "F co," with a shorter haul from its Alabama ines, brought coal into Memphis a rate war w precipitated which bore the rate down to 45 cen and, in October, 1901, a rate of $1.25 from ll mines was agreed upon and established. Th rate was reduced in August, 1902, to $1, ar so remained until it was advanced to $1.10 in 1 1.

Thus we see that for nearly 10 years this traffic was carried to Memphis from the Kentucky field for $1 per ton, while the same ra was charged from the same field to Nashville, te average distance to Memphis being 276 mile and that to

Nashville 108.5 miles. When the rate to Memphis was raised to $1.10, shippers complained that the rate was unreasonable, and the hearing before the commission, referred to, was had. (26 I. C. C., 402.) The case was submitted in October, 1912. The increased cost to the railroad in wages and other items was considered, and the commission found that the rate of $1.10 was a reasonable rate for the average haul of 276 miles. This Memphis rate produces a per-ton-mile revenue of slightly less than 4 mills. The rate charged to Nashville produced a revenue of 9.2 mills per ton-mile. The commission reduced the rate on the Louisville & Nashville one-fifth, which would leave the rate about 7.36 mills. This is almost double the per-ton mile of the Memphis rate. This constitutes substantial evidence and was properly considered by the commission.

The rate from the Kentucky field to Louisville was considered. The distance to Louisville varies, but is, on the average, longer than the hauls to Nashville. The rate to Louisville was 60 cents, but in June, 1913, it was advanced to 65 cents. Comparisons were made and competition considered. It was an item of evidence substantial and persuasive. But the rate finally fixed by the commission is 33⅓ per cent higher than the Louisville rate, disregarding the increased distance.

In view of what this court has defined " substantial evidence " to be, there was substantial evi-

dence in this case to support the order relating to the rates and no rule of evidence was violated.

The distance over the Nashville, Chattanooga & St. Louis is longer than the haul over the Louisville & Nashville, and the rate on that line was not reduced as much as over the last-named line.

D. *Orders not arbitrary.*—The existence of substantial evidence above shown also disposes of the charge that the action of the commission was "arbitrary." The meaning of this word, used in this connection, may be drawn from the opinion in the *Union Pacific case, supra,* and other cases in which that case has been cited by this court. The cases clearly show that arbitrary action is where the court acted *without evidence* or clearly contrary to the *uncontradicted evidence.* The court expressly disclaims any right to weigh the evidence, and therefore it can not be said to be arbitrary because against the weight of evidence. Nor can it be because the order is, in the judgment of the court, unwise. In the *Union Pacific case, supra,* it was stated that the court "will not consider the expendiency or wisdom of the order or whether, on like testimony, it would have made a similar ruling." If, then, there was substantial evidence to support the order, the action of the Commission can not be condemned as *arbitrary,* or an unreasonable exercise of power.

**III. On the facts of record before it, the Co Commission was empowered to require appellants to cease and d desist from their unjust discrimination with respect to switc itching practices at Nashville.**

A. *Switching practices at Nashvi ville.*—As shown by the report of the commissi sion, beginning page 69 of the record, the termi minal tracks of the appellants at Nashville are divi vided into three parts: (1) That part vested in the Louisville & Nashville Terminal Company, a corporation whose entire capital stock is owned d by the Louisville & Nashville; (2) that vested i in and operated by the Louisville & Nashville; and nd (3) the part vested in and operated by the N Nashville, Chattanooga & St. Louis.

1. Without going through the p processes of incorporation and manner of acqui iring title, it is sufficient to say that the terminal company holds the title to 1.07 miles of main line and 30.32 miles of sidings.

> In 1896 all of its property y was leased for 999 years jointly to the Lou uisville & Nashville and the Nashville, Cha attanooga & St. Louis at a rental of 4 per cent per annum upon the cost, the amount t to be paid by each company being determi ined on basis of use. The operating expens ses are prorated upon the same basis. (Com m. Report, Rec., p. 69.)

2. The Louisville & Nashville Railroad Company owns tracks within the switching district, which it operates independently.

3. The Nashville, Chattanooga & St. Louis Railway also owns and operates independently tracks within the switching district.

The appellants, as operating companies, interswitch traffic of all kinds for each other to and from all these terminals within the switching district of Nashville between fixed points at rates named in their tariffs.

The Tennessee Central Railroad has physical connection with the railroads of appellants within the switching district of Nashville. Interswitching of non-competitive traffic was carried on at tariff rates between the Tennessee Central and the appellants *except as to coal.* The facts stated by the Commission and its conclusions are as follows (Rec., p. 70):

> Prior to 1907 neither of these roads [appellants] would switch freight of any kind to or from the Tennessee Central, but in that year, "in deference to public opinion," they began switching all noncompetitive traffic, *except coal,* to and from the Tennessee Central. The charge for this service is $3 per car. Although both roads are emphatic in asserting that they have never considered the switching of coal from the Tennessee Central, the Nashville, Chattanooga & St. Louis did have effective rates applicable to and from its interchange with the Tennessee Central under which such a movement could have been accomplished for 60 cents per ton. Some

surprise was expressed when this fact was developed at the hearing, and shortly thereafter this rate was canceled. Complainants aver that this situation unjustly discriminates against coal from the Tennessee Central, that the practice with respect to switching coal at Nashville is unreasonable, and that the charge therefor (effective until shortly after the hearing) is unreasonable. While the switching tariff of the Tennessee Central is similar to those of the Louisville & Nashville and the Nashville, Chattanooga & St. Louis, that road's refusal to switch coal from either of the other lines is in reality a retaliatory measure. It has styled itself a " cross-complainant " and favors this portion of petitioners' prayer. (Rec., p. 70.)

* * * * *

Our conclusion is that the practice of defendants with respect to switching coal at Nashville is unreasonable and unjustly discriminatory; that the present tariffs of the Louisville & Nashville and the Nashville, Chattanooga & St. Louis unjustly discriminate against shipments of coal from the Tennessee Central and unduly prefer shipments of coal from the lines each of the other. We find that a just and reasonable practice with respect to switching at Nashville to be observed by all defendants will permit the switching of coal from the interchange of each carrier to industries on the rails of the other. (Rec., p. 71.)

B. *Appellant's theory as to error assigned.*—Appellants claim that this order is in excess of the authority conferred upon the Commission. They base their claim upon the exception in section 3 of the act to regulate commerce, which reads:

> * * * But this shall not be construed as requiring any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business.

This provision must be read in connection with the substantive law which precedes it. This is as follows:

> Every common carrier * * * shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers and property to and from their several lines and those connecting therewith, and shall not discriminate in their rates and charges between such connecting lines. (Sec. 3, act to regulate commerce.)

Section 15 of the act provides:

> That whenever, after full hearing upon a complaint * * * the commission shall be of opinion * * * that any individual or joint classifications, regulations, or practices whatsoever of such carrier or carriers subject to the provisions of this act are unjust or unreasonable or unjustly

> discriminatory, or unduly preferential or prejudicial or otherwise in violation of any of the provisions of this act, the commission is hereby authorized and empowered to determine and prescribe * * * what individual or joint classification, regulation, or practice is just, fair, and reasonable, to be thereafter followed, and to make an order * * * *

The complaint before the commission was filed by the traffic bureau of Nashville, Tenn., and complained of the regulation and practice regarding the exclusion of coal from the interswitching practice by the appellants. The appellants admitted the practice, but defended it solely upon the ground:

> That to require them to perform this switching would be to compel them to give the use of their terminal facilities to another carrier engaged in like business, in contravention of the proviso of section 3, that their terminals are not now open to any except noncompetitive traffic; and that, while coal comes from noncompetitive points, the very nature of the commodity renders it competitive. (Rec., p. 70.)

In reply to this contention by appellants, the commission, in its report, said (p. 70):

> As we said in *Merchants & Mfrs. Asso. of Baltimore* v. *P. R. R. Co.*, 23 I. C. C., 474, 476, "Terminals are either open or they are not," and a carrier may not exer-

> cise an arbitrary discretion, based upon a strained construction of the proviso of section 3, in saying for what roads and what traffic it will open its terminals and for what other roads and traffic it will decline so to do. In this case the joint and the separately owned terminals of each of these two defendants are open to all of the traffic of the other; are open to all noncompetitive traffic to and from the Tennessee Central except coal, and, up to shortly after the hearing, those of the Nashville, Chattanooga & St. Louis were open as to this coal, but at a prohibitive rate.

The report shows that there are industries located on all the lines of railroads within the switching district to which coal is consigned from different mines. To enable these industries to secure coal from mines served by the different railroads it is necessary that there be an interswitching service between all the roads.

All of the railroads entering Nashville have voluntarily opened their terminals and published tariffs for the switching of cars from and to industries located upon their lines within the switching district. Coal is excepted from this privilege. The theory of the appellants is that coal is competitive traffic, and, being competitive, they may discriminate against it. Admitting that coal is competitive, the question arises whether under the law the appellants may discriminate against traffic simply because it is com-

petitive. Or, to put it in another form, is the power given to the commission in section 15 to determine whether classification and practices are in violation of the act, restricted by a carrier's right to exclude "competitive traffic" from certain transportation services offered?

The appellants are not dealers in coal. They are simply furnishing transportation for coal. Their competition is for the traffic; if, by reason of disadvantageous circumstances in the matter of delivery, an industry is compelled to buy its coal from the mines on appellants' lines, to the exclusion of coal upon the lines of other carriers, they say they may create such disadvantages by arbitrary classification in interswitching because the *transportation* is competitive.

If the appellants may refuse interchange privileges to a commodity, why may they not exclude particular mines and say that they will not switch cars from mines in a particular locality or from certain shippers and thus compel the industries on their sidings in Nashville to buy all their coal from other mines or other shippers? If they may thus discriminate in the practice of interswitching carried by their tariffs, why not as to line hauls?

> Whenever one engages in that business [common carrier] the obligation of equal service to all arises, * * *. *Mo. Pac. Ry.* v. *Larabee Mills,* 211 U. S., 612, 619.

Section 3, in the first paragraph, forbids discrimination between shippers or localities. To re-

fuse this privilege to the Tennessee Central and its connecting line, the Illinois Central, is to put all mines upon these lines at a disadvantage in Nashville, and to give a preference to the mines which are located upon, and ship over, the appellants' roads that enjoy this privilege. Coal is mined by the owners, who are the shippers, and this discrimination runs against them. If the Commission finds, upon the undisputed facts, that this is an *unjust discrimination,* an *unlawful preference,* will the courts say that it is not?

This court, speaking through the Chief Justice, said:

> In view of the doctrine announced in *Interstate Com. Com.* v. *Illinois Cent. R. R.,* 215 U. S., 452; *Interstate Com. Com.* v. *Delaware, L. & W. R. Co.,* 220 U. S., 235; *Interstate Com. Com.* v. *Louisville & Nashville R. R.,* 227 U. S., 88, it plainly results that the court below, in substituting its judgment as to the existence of preference for that of the Commission on the ground that where there was no dispute as to the facts it had a right to do so, obviously exerted an authority not conferred upon it by the statute. It is not disputable that from the beginning the general purpose for which the Commission was created was to bring into existence a body which from its peculiar character would be most fitted to primarily decide whether from facts, disputed or undisputed, in a given case preference or

discrimination existed.—*United States* v. *Louis. & Nash. R. R. Co.*, 235 U. S., 314, 320.

The question of opening the terminals is not, we submit, involved in this case, as the railroads have voluntarily opened their terminals and by their tariffs and practice are complying with the positive requirements of section 3 which make it the duty of carriers "according to their respective powers" to "afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers and property to and from their several lines and those connecting therewith." The sole question is whether, in rendering this service, they may *discriminate against a particular commodity.* It will be observed that this paragraph in section 3 does not use the word *undue* discrimination, but says that the carriers "shall not discriminate in their rates and charges between such connecting lines." A prohibitive rate of 60 cents had been put in by one of the appellants for switching coal from the Tennessee Central while a charge of $3 per car was the tariff rate to the other roads. This was a clear violation of the provision in section 3.

The finding of the commission was that the practice of the appellants "with respect to switching coal at Nashville is unreasonably and unjustly discriminatory."

**IV. The order with respect to switching practices does not deprive appellants of their property without due compensation, in violation of the Fifth Amendment to the Constitution of the United States.**

A. *Requirements of the order.*—The pertinent provisions of the order in question are as follows:

> That the defendants * * * be, and they are hereby, notified and required * * * to abstain from maintaining any different practice with respect to switching interstate carload shipments of coal from and to the tracks of the Tennessee Central Railroad Company at Nashville, Tennessee, than they contemporaneously maintain with respect to similar shipments of coal from and to their respective tracks.
>
> * * * [and] to maintain and apply to the interswitching of interstate carload shipments of coal at Nashville, Tennessee, a practice which will permit the interswitching of such shipments from and to the lines of each and every defendant [including the Tennessee Central Railroad Company]. (Matter in brackets added.)

B. *Construction of exception in section 3.*—This exception follows the substantive law of the section which provides, as noted, *supra,* that each railroad shall according to its ability furnish to connecting carriers " equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering " of freight. We submit that the proviso should not be so construed as to annul the substantive law.

It should receive a construction that will give full effect to the act and at the same time protect the railroads from unfair invasion or interference with their terminal tracks. The interests of the public are to be considered, and the carrier is required to furnish *transportation* of this character on equal terms.

The act to regulate commerce deals with transportation. It does not undertake to control the conjoint *use* by carriers of their tracks or terminals with other lines. A railroad company may allow to another railroad trackage rights over any part of its line, or the joint use of its terminals, and refuse a like privilege to another railroad; this is not unlawful discrimination. But a company may not refuse *transportation* over its tracks to one carrier or shipper while giving such *transportation* to another carrier or shipper. The discrimination forbidden by the act has reference to *transportation.*

Transportation is *movement,* and when one carrier *moves* over *its tracks* the cars of another carrier *it is furnishing transportation* to the latter. To refuse to one road or shipper a *transportation service* which it is offering by its tariffs and practice to others carriers or shippers is in direct violation of the act. Transportation as used and defined in the act includes " all instrumentalities and facilities of shipment or carriage * * * and all services in connection with the receipt, delivery,

elevation, and transfer in transit," w which a carrier is performing for any shipper or c carrier. There is a clear and well defined distinctio on between the *use* of tracks and facilities which o one carrier by contract voluntarily accords to an nother carrier, and the transportation services wh hich a carrier performs for the public. The con mmission may regulate the latter; the former is bey eyond its juris-diction.

To compel a carrier to *give* the *us* *use* of its property or any part of it to another car arrier would be a taking of property without compe ensation. But a common carrier may be require red to furnish *transportation* upon equal terms t to all comers. Of course, there must be compensa sation for the service rendered, but the law may y say *as to a* *transportation service* by a common on carrier that there shall be no discrimination b between those desiring the service, either as to the e facilities afforded or the rates and charges ma made therefor.

A carrier has the *use* of the track cks of another carrier when it may operate its own n cars and engines over such carrier's tracks by pay paying a rental.

> "Use the tracks" implies s use for the purpose of operating its cars th thereon. (*Colonial City Trackage Co.* v. *K Kingston City R. R. Co. et al.*, 153 N. Y., 54 540; 47 N. E., 810.)

With reference to the interchange of e of equipment:

> It can not be said that the the plaintiff in error had a constitutional righ right to burden

> trade by insisting that the commodities should be unloaded and reloaded in its own equipment. Upon this point the case of *Wisconsin, etc., R. R. Co.* v. *Jacobson,* 179 U. S., 287, is decisive. There is no essential difference, so far as the power of the State is concerned, between such an order as we have here and one compelling the carrier to make track connections, and to receive cars from connecting roads, in order that reasonably adequate facilities for traffic may be provided.—*Chicago, Milwaukee & St. Paul Ry. Co.* v. *Iowa,* 233 U. S., 334, 344. See also *Grand Trunk Ry.* v. *Michigan Ry. Commission,* 231 U. S., 457.

The usual significance of the word "*use*" means physical occupation of tracks. (*Rock Island Ry. Co.* v. *Rio Grande R. R. Co.,* 143 U. S., 590; *Union Pacific Ry. Co.* v. *Chicago, etc., Ry. Co.,* 163 U. S., 563, 582, 583.)

We are not discussing in this case whether the Interstate Commerce Commission has power to require a railroad to open its terminals and perform interswitching transportation, but we submit that when a railroad company has opened its terminals and is performing interswitching transportation for other carriers it may not discriminate between carriers, or as to the commodities which it will transport; and that requiring a carrier offering such transportation to perform it *without discrimination* is not requiring the carrier "to give the use of its tracks or terminal facilities to another carrier engaged in like business."

**V. There was no error in the refusal of the District Court to grant appellants' motion for an interlocutory injunction.**

A. *Justiciable issues before District Court.*—The first concise statement of justiciable issues, in cases to restrain and set aside orders of the Commission made by this court, is in the *Union Pacific case,* in which Mr. Justice Lamar, delivering the opinion, said:

> There has been no attempt to make an exhaustive statement of the principle involved, but in cases thus far decided it has been settled that the orders of the Commission are final unless, (1) beyond the power which it could constitutionally exercise; or (2) beyond its statutory power; or (3) based upon a mistake of law. But questions of fact may be involved in the determination of questions of law, so that an order, regular on its face, may be set aside if it appears that (4) the rate is so low as to be confiscatory and in violation of the constitutional prohibition against taking property without due process of law; or (5) if the Commission acted so arbitrarily and unjustly as to fix rates contrary to evidence, or without evidence to support it; or (6) if the authority therein involved has been exercised in such an unreasonable manner as to cause it to be within the elementary rule that the substance and not the shadow determines the validity of the exercise of the power. (*Int. Com. Com.* v. *Ill.*

*Cent.*, 215 U. S., 452, 470; *Southern Pacific* v. *Int. Com. Com.*, 219 U. S., 433; *Int. Com. Com.* v. *Northern Pacific*, 216 U. S., 538, 544; *Int. Com. Com.* v. *Alabama Midland Ry. Co.*, 168 U. S., 144, 174.

In determining these mixed questions of law and fact the court confines itself to the ultimate question as to whether the commission acted within its power. It will not consider the expediency or wisdom of the order, or whether, on like testimony, it would have made a similar ruling. "The findings of the commission are made by law *prima facie* true, and this court has ascribed to them the strength due to the judgments of a tribunal appointed by law and informed by experience." (*Ill. Cent.* v. *I. C. C.*, 206 U. S., 441.) Its conclusion, of course, is subject to review, but when supported by evidence is accepted as final; not that its decision, involving, as it does, interests, can be supported by a mere scintilla of proof—so many and such vast public but the courts will not examine the facts further than to determine whether there was substantial evidence to sustain the order. (*Int. Com. Comm.* v. *Union Pacific R. R.*, 222 U. S., 541, 547–548.

These issues were again stated in the *Proctor & Gamble case*, where the Chief Justice, speaking for the court, said:

> The courts were confined by statutory operation to determining whether there had

> been violations of the Constitution, a want of conformity to statutory authority, or of ascertaining whether power had been so arbitrarily exercised as virtually to transcend the authority conferred. (*Proctor & Gamble* v. *U. S.*, 225 U. S., 282.)

Again speaking through Mr. Justice Lamar, this court said:

> The statute, instead of making its orders conclusive against a direct attack, expressly declares that "they may be suspended or set aside by a court of competent jurisdiction." (36 Stat., 539, 15.) Of course, that can only be done in cases presenting a justiciable question. But whether the order deprives the carrier of a constitutional or statutory right; whether the hearing was adequate and fair; or whether, for any reason, the order is contrary to law, are all matters within the scope of judicial power. (*Int. Com. Comm.* v. *Louisville & Nashville R. R.*, 227 U. S., 88, 92–93.)

In the *Minnesota Rate cases,* speaking through Mr. Justice Hughes, this language was used:

> And the question whether the carrier, in such a case, was giving an undue or unreasonable preference or advantage to one locality as against another, or subjecting any locality to an undue or unreasonable prejudice or disadvantage, would be primarily for the investigation and determination of

> the Interstate Commerce Commission and not for the courts. The dominating purpose of the statute was to secure conformity to the prescribed standards through the examination and appreciation of the complex facts of transportation by the body created for that purpose; and, as this court has repeatedly held, it would be destructive of the system of regulation defined by the statute if the court, without the preliminary action of the commission, were to undertake to pass upon the administrative questions which the statute has primarily confided to it. (*The Minnesota Rate cases,* 230 U. S., 352, 419–420.)

Speaking through Mr. Justice Lamar, the court again said:

> All these are matters committed to the decision of the administrative body, which, in each instance, is required to fix reasonable rates and establish reasonable practices. The courts have not been vested with any such power. They can not make rates. They can not interfere with rates fixed or practices established by the commission unless it is made plainly to appear that those ordered are void. (*I. C. C.* v. *Union Pacific R. R.,* 222 U. S., 541, 547.) No such showing is made in this case. The decree must, therefore, be *affirmed.* (*Atch. Railway Co.* v. *United States,* 232 U. S., 199, 221.)

B. *Reviewable issues on appeal from interlocutory order denying motion for injunction pendente lite.*—What are the issues to be reviewed upon an appeal from an interlocutory order denying a motion for an injunction *pendente lite?* This is an important question of practice, as there are many suits brought against the commission where injunctions are denied.

The act creating the Commerce Court in express terms allowed an appeal from an interlocutory order "*granting* or continuing" an injunction. The provision is found in section 210, Judicial Code, and reads:

> An appeal may also be taken to the Supreme Court of the United States from an interlocutory order or decree of the Commerce Court granting or continuing an injunction restraining the enforcement of an order of the Interstate Commerce Commission.

The statute did not authorize an appeal from an interlocutory order denying an injunction.

The act abolishing the Commerce Court, approved October 22, 1913, among other things, provides:

> No interlocutory injunction suspending or restraining the enforcement, operation, or execution of, or setting aside, in whole or in part, any order made or entered by the Interstate Commerce Commission shall be issued * * * unless the application for the same shall be presented to a circuit or

> district judge, and shall be heard and determined by three judges, of whom at least one shall be a circuit judge, and unless a majority of said three judges shall concur in granting such application.
>
> * * * * *
>
> An appeal may be taken direct to the Supreme Court of the United States from the order granting *or denying* after notice and hearing, an interlocutory injunction, * * *.

In the *Lighterage case,* 225 U. S., 306, 324, 325, this court had before it an appeal from an order of the Commerce Court granting an interlocutory injunction. After deciding that a restraining order for 60 days must contain a statement of the facts showing irreparable damage resulting from the order of the commission, this court, considering the power to issue a preliminary injunction, speaking through the Chief Justice, said:

> It must therefore in reason be that the power to issue a preliminary injunction was recognized and preserved so as to afford the court the proper time for deliberation and consideration of the questions to be decided by the commission instead of compelling that body virtually *eo instante* upon the presentation of a petition to reach a final conclusion. And it would seem also to be the case that the right to appeal from such an order was given *as a safeguard against a possible abuse of discretion by an unwarranted, arbitrary and unreasonable exercise of the power conferred.*
>
> * * * * *

> Our duty is * * * to uphold the lawful authority of the court, without deviation and yet without hesitancy *where there has been an abuse of discretion* to correct it in the completest way. (Italics ours.)

This case seems to settle two questions: (1) That the granting of an interlocutory injunction is a matter of discretion resting with the judges, and (2) that on an appeal from an interlocutory order granting an injunction the question to be determined by this court is whether or not the judges are chargeable with an "abuse of discretion by an unwarranted, arbitrary, and unreasonable exercise of the power conferred." This ruling is applicable, we submit, and should be applied in cases of appeal, under the recent statute, from an interlocutory order denying a temporary injunction. In fact, it is difficult to see what other issue can be before the court.

The Circuit Court of Appeals, Fifth Circuit, in an appeal from an interlocutory order granting a temporary injunction, speaking through McCormick, Circuit Judge, said:

> The volume of assisting and counter affidavits was large, and the conflict of this testimony sharp and emphatic, such as must, in the nature of the case, make variant impressions on the minds of different judges as to the facts shown. * * * The providing by law for an appeal from an interlocutory order granting an injunction certainly clothes the court of appeals with the power and charges it with the duty

> of reviewing, and in a proper case reversing, the action of the trial court in granting such injunctions; but as to issues of fact, presented as they only can be presented in such cases, the findings of the facts expressed or implied in the action of the trial court should be given due weight, and its action, so far as it rests on, or is affected by, the state of facts proved, should not be reversed unless it is made clearly to appear that it was improvident and hurtful to the appellant. — *Workingmen's Amalgamated Council* v. *United States,* 57 Fed., 85, 86.

The Circuit Court of Appeals of the Ninth Circuit, in a similar appeal, speaking through De Haven, district judge, said:

> Inasmuch as the granting of an injunction *pendente lite* is committed to the discretion of the trial court, it necessarily follows—and so the authorities uniformly hold—that upon an appeal from such an order the only question which the appellate court is called upon to determine is whether the court, in making such an order, abused its discretion.—*Southern Pacific Co.* v. *Earl,* 82 Fed., 690, 692.

The Circuit Court of Appeals of the Eighth Circuit, in an appeal from an order *denying* a temporary restraining order, said:

> In disposing of the application for a temporary restraining order the lower court was called upon to exercise one of its discretionary powers, and the order from

> which the appeal is taken should not be disturbed unless there is a strong probability that on the final hearing the complainants will show themselves to be entitled to the relief sought by the supplemental bill, or unless it appears that the complainants will sustain great loss and damage, or that they will be put to unnecessary trouble and expense, *if the existing status is not maintained until the final hearing.* It rests in the sound judicial discretion of a chancellor to grant or withhold the species of interlocutory relief which was sought in the present instance, and, as the court has heretofore held, in substance, it will not undertake to reverse the action of a court or judge to whom an application for such relief is first addressed, unless it clearly appears that the court or judge erred in the exercise of that discretion, and that, in accordance with well-established equitable principles and rules of procedure, it should have acted differently. *City of Newton* v. *Levis,* 49 U. S. App., 266, 25 C. C. A. 561, 79 Fed. 715; *Kelley* v. *Boettcher* (C. C.) 89 Fed. 125, 128, 129.—*Higginson* v. *C. B. & Q. R. Co.,* 102 Fed., 197, 199.

The Circuit Court of Appeals, Fifth Circuit, in an appeal from an order *granting* a temporary injunction, speaking through Shelby, Circuit Judge, said:

> Formerly the granting of an injunction *pendente lite* was in the absolute discretion of the primary court, inasmuch as its action

> was not reviewable by appeal. [Citing cases.] * * * But since this act was passed its uniform construction has been that the granting of an injunction pending the suit is in the sound judicial discretion of the trial court, and that its order will not be disturbed on appeal unless it is violative of the rules of equity that have been established for the guidance of its discretion. In some of the cases the same meaning is expressed by saying that the ruling of the trial court in granting the temporary injunction will not be reversed unless there has been an "abuse" of its discretion, and in others it is said that the decree will not be reversed unless it clearly appears that the injunction has been "improvidently" allowed. The appellate court is not to decide what it would have done as to allowing the injunction, but it must recognize that the law has imposed on the trial court the responsibility of the exercise of this power and the duty to exercise this discretion, and unless there has been a plain disregard of some settled rule of equity which should govern the issue of injunctions, so that it appears clearly that the injunction is issued improvidently, the decree should not be reversed.—*Kerr* v. *City of New Orleans,* 126 Fed., 920, 924.

The Court of Appeals of the State of New York, in an appeal from an interlocutory order *granting* a temporary injunction, speaking through Mr. Chief Justice Anderson, said:

> Neither injury to the plaintiff's property, inadequacy of the legal remedy, or any pressing or serious emergency, or danger of loss, or other special ground of jurisdiction, is shown by the complaint. The complaint, therefore, does not show that the plaintiff is entitled to final relief by injunction. * * * It is doubtless sufficient that a probable or *prima facie* case be made, to justify the granting of an injunction *pendente lite,* but where, as in this case, it clearly appears that the complaint shows no cause of action, then a preliminary injunction is unauthorized, and the granting of it is error of law, which may be reviewed by this court on appeal.—*McHenry* v. *Jewett,* 90 N. Y., 58, 62.

The same court, again on a like appeal, speaking through Mr. Chief Justice Ruger, said:

> The order was granted upon pleadings and affidavits presenting a controverted state of facts, and, so far as the question depends on such facts, we must assume that the court below proceeded upon the theory that the plaintiffs' version was correct. Upon this assumption it is quite clear that the order was discretionary and not appealable by this court. We have repeatedly held that the granting, continuing, or dissolving of a temporary injunction is within the discretion of the court of orginal jurisdiction, and that its determination can not be reviewed here.—*Strasser et al.* v. *Moonelis,* 108 N. Y., 611, 612.

The same court, speaking through Mr. Justice Finch, said:

> We do not review the discretion which grants an injunction temporarily restraining a defendant until final judgment unless we are entirely satisfied that the plaintiff is not entitled to ultimate relief.
>
> *MacLaury* v. *Hart et al.,* 121 N. Y., 636, 642; *Young* v. *R. K. G. L. Co. et al.,* 129 N. Y., 57, 60; *Castoriano* v. *Dupe,* 145 N. Y., 250.

In a case where an injunction was *denied,* the same court, speaking through Mr. Justice Vann, said:

> In the case now before us the order of the General Term is silent as to the ground on which the injunction was denied. It therefore may have been made by the court, in the exercise of its discretion, to refuse an injunction until the trial of the action upon the merits, when the facts will be finally determined upon all the evidence after an opportunity for cross-examination of the witnesses.
>
> We think the rule established by the decisions is that an order of the General Term affirming or refusing an order granting or denying a temporary injunction can not be reviewed by this court unless it appears from the record that the element of discretion was excluded or that the injunction was sustained when in fact there was no power to grant it or was set aside ex-

> pressly upon that ground. Such an order of the court below presents a question of law that we have the right to review, but unless it clearly appears that the action of the court was not based upon its discretionary power we can not review it.—*Schneider* v. *City of Rochester,* 155 N. Y., 619, 623.

The Supreme Court of Georgia, speaking through Mr. Justice McCay, said:

> The granting or refusing injunctions is in the wise discretion of the chancellor. * * * We desire to say that in the granting and refusing injunctions, until the the hearing, the judge of the Superior Court is clothed by the law with a discretion. If this court undertakes to reverse his judgment simply because we think the burden of the case is, on the facts, against his judgment, we should be ourselves assuming an original jurisdiction not granted to this court.—*Bonand* v. *Genesi,* 42 Ga., 639, 640.

Again the same court, speaking through Mr. Chief Justice Warner, said:

> The granting or refusal to grant an injunction is vested by law in the discretion of the judge of the Superior Court to whom the application is made, and being so vested, it was manifestly intended that that officer should exercise that discretion, on the statement of facts exhibited to him, and this court will not interfere with the exercise of that discretion, unless some well established

> rule of law or principle of equity has been violated, which is not disclosed by the record in this case.—*Jones, Drumwright & Co.* v. *Thatcher & Co.* 48 Ga., 83, 84.

The Supreme Court of the State of Louisiana, passing upon the question "That no appeal lies from the exercise of discretion by the judge in either granting or refusing an injunction," speaking through Mr. Chief Justice Manning, said:

> It has long and often been held otherwise. This court will not interfere by anticipation with the exercise of that discretion by the inferior court, but it will review the judgment in order to ascertain whether the discretion has been properly exercised. In every case in which the law leaves anything to the discretion of a court, a sound and legal discretion is understood, and not an arbitrary one.—*Beebe* v. *Guinault,* 29 La. An., 795.

In the *Lighterage case* this court assigned as one of the purposes of a preliminary injunction, "to afford the court the proper time for deliberation and consideration of the questions," etc.

Whether the court of original jurisdiction desires, in a particular case, time to consider and deliberate upon the questions involved before permitting a change in the existing conditions should be for that court to determine. Its decision will depend upon whether the uncontroverted facts, or the conclusions of the court upon con-

flicting evidence, raise a fair presumption that the complainant will be entitled to a permanent injunction on final decree. It may be that the failure of the complainant, without satisfactory explanation, to file his bill in time for the court to give some consideration to the case without issuing a restraining order, will properly influence the decision. In either case the trial court exercises a discretion vested in courts of equity which ordinarily is not reviewable on appeal. Where such interlocutory orders are made reviewable by statute the exercise of such discretion by the lower court may not be reviewed and reversed unless it clearly appears that the court in refusing the injunction exercised its discretion arbitrarily or committed a grave error of law.

If this were not so, this appeal would bring the case before this court for determination *de novo;* it would be tantamount to a direct application to this court for an injunction *pendente lite.*

C. *Grounds on which injunction asked, unwarranted.*—The petition claims the relief prayed for upon three distinct grounds:

1. That there was no evidence before the Commission to support the order;
2. That the Commission was without jurisdiction to make the order; and
3. That the constitutional rights of the petitioner were violated by the order.

1. The allegations that there was no substantial evidence to support the order, and that the finding of the Commission was contrary to the indisputable character of the evidence, are expressly denied in the sworn answer of the Commission. The appellants did not present the record before the Commission and, therefore, there was no evidence before the court upon which it could determine that issues except the report of the Commission; the report states the facts and conclusions of the Commission, and completely refutes the allegations of the bill.

2. The question as to the reasonableness of the rates, involved in the first order, it has been determined by this court in many cases, is peculiarly and exclusively within the jurisdiction of the Commission.

> *Texas & Pac. Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S., 426; *Int. Com. Comm.* v. *Ill. Cent. R. Co.*, 215 U. S., 452; *B. & O. R. R. Co.* v. *Pitcairn Coal Co.*, 215 U. S., 481; *Int. Com. Comm.* v. *Union Pac. R. Co.*, 222 U. S., 541; *Int. Com. Comm. v. C., R. I. & P. Ry.*, 218 U. S., 88, 110; *Int. Com. Comm.* v. *L. & N. R. Co.* 227 U. S., 88.

The jurisdiction of the commission as to question of undue discrimination in the practices of carriers is also a closed question.

> *N. Y., N. H. & H. R. R. Co.* v. *Int. Com. Comm.*, 200 U. S., 361; *Armour Packing Co.* v. *U. S.*, 209 U. S., 56; *So. Pac. Co.* v. *Int.*

*Com. Comm.*, 219 U. S., 433; *Int. Com. Comm.* v. *B. & O. R. R. Co.*, 225 U. S., 306; *Houston & Tex. Ry.* v. *U. S.*, 234 U. S, 342; *United States* v. *Louis. & Nash. R. R. Co.*, 235 U. S., 314.

3. As to the allegations in the complaint of want of due process, and taking of property without compensation, no special facts were alleged in the bill from which the court could conclude that there was a violation of the constitutional rights of the appellants; on the contrary the findings of the commission that the rates fixed in the first order are reasonable and that the interswitching practice was unduly discriminatory, were binding upon the court, upon the record made; the rate charged for switching cars was initiated and fixed by the appellants and they can not claim that this rate is confiscatory as against the order. The court, therefore, could not conclude upon the record as made that there had been any violation of the constitutional rights of the appellants.

As heretofore stated, the report and the order of the commission was made on the 9th day of December, 1913, to become effective February 15, 1914, more than two months intervening. This gave the appellants ample time within which to prepare and file a bill and give the court a reasonable time to deliberate, and review the case, before the order became effective. The appellants deliberately and without excuse waited until the very last day upon

which they could file their bill and give the statutory notice, and thus required the court to act *eo instante*. If it was the intention of the appellants to put the court in a position where it would have to issue a restraining order, or decide the case without deliberation, a more effective course could not have been adopted to accomplish this purpose. Upon this record, and upon the authorities cited, we submit that the three judges who refused the restraining order, did not exercise their discretion *arbitrarily* nor did they commit any grave error of law.

The argument which succeeded the decision of the judges refusing a restarining order was made upon the theory and knowledge that the tariffs establishing the new rates and practices required by the commission's orders had been filed. The question therefore before the court was whether a preliminary injunction should thereafter be issued restraining an order already complied with.

There are grave difficulties attending the restraining or enjoining of orders of the commission which have been complied with. The tariffs having been filed in compliance with the order, the injunction could operate only upon the two-year requirement, but the old tariffs which had been canceled would not be revived. The carriers may, if the orders are enjoined, file new tariffs, restoring the old rates or putting in others, upon a 30-day notice under section 6. Under section 15 the com-

mission is given power, upon complaint or otherwise, to suspend any new tariff filed, for a period of 120 days with a further right to extend the suspension if necessary. This case could have been submitted upon final hearing in the court below, and decided upon a complete record within the time required to change the tariff, and on appeal would have reached this court by this time. In view of these conditions, and the fact that the rates and practices had been ordered in by the tribunal charged by law with the duty of determining and fixing reasonable rates and practices, we submit that it would have been improvident for the court to restrain the orders which had been complied with, before a final hearing of the case. It is only upon a final hearing that all of the facts can be properly presented and considered and the law be deliberately and properly applied.

Again, upon the facts as we have above presented them, the reasons which would lead to a denial of a restraining order apply with equal force to the granting of a preliminary injunction.

## CONCLUSION.

In view of all these circumstances, and the facts appearing of record, we submit that the three judges did not act arbitrarily nor did they commit any grave error of law in refusing the preliminary injunction. We therefore submit that this appeal should be dismissed.

In conclusion, we call especial attention to the able opinion of the District Court, beginning at page 83 of the record.

Respectfully submitted.

JOSEPH W. FOLK,
CHARLES W. NEEDHAM,
*Counsel for the Interstate Commerce Commission.*

○